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Strategies of Difference: Litigating for Women's Rights in a Man's World

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> "We ask no favors for our sex. All we ask of our brethren is that they take their feet off our necks."
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> —Sarah Grimke, quoted by Ruth Ginsburg in Brief for Appellants in *Kahn v. Shevin*

> "Women's situation offers no outside to stand on or gaze at, no inside to escape to, too much urgency to wait, no place else to go, and nothing to use but the twisted tools that have been shoved down our throats. If feminism is revolutionary, this is why."
>
> —Catharine MacKinnon

I. Introduction

In July of 1982, three members of the Supreme Court recognized a problem with sex discrimination law. In *Mississippi University for Women v. Hogan*[1]—a case holding unconstitutional a sex-segregated school of nursing—dissenting Justices Blackmun, Powell and Rehnquist each decried a result that they saw as leading to "needless conformity."[2] Powell wrote:

> The Court's opinion bows deeply to conformity. Left without honor—indeed, held unconstitutional—is an element of diversity that has characterized much of American education and enriched much of American life. . . . The Court decides today that the Equal Protection Clause makes it unlawful for the State to provide women with a traditionally popular and respected choice of educational environment. It does so in a case instituted by one man, who represents no class, and whose primary concern is personal

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1. 458 U.S. 718 (1982). In *Hogan*, a man successfully challenged his exclusion from a women-only state school of nursing as discrimination on the basis of sex.

2. *Id.* at 735 (Blackman, J., dissenting), 745 (Powell and Rehnquist, J.J., dissenting).

convenience.[3]

The dissenters' complaint is two-fold; they see the Court valuing conformity over diversity, while invoking sex discrimination law in favor of a male plaintiff. Their criticisms have a certain superficial appeal. Equality, in our society, and particularly in our legal culture, often looks disturbingly like conformity. And, anomalously, the majority decision bears strong language about judicial scrutiny of sex discrimination, but involves a man seeking entrance to a women's school, and not vice versa. These problems, however, are hardly unique to *Hogan*. Male plaintiffs have dominated the short history of sex discrimination law at the Supreme Court.[4] Moreover, the law of sex discrimination to a significant extent *requires* conformity: working

3. *Id.* at 735.

4. The list of Supreme Court sex discrimination decisions elicited by male plaintiffs could serve as a casebook outline of the law in this area: Kahn v. Shevin, 416 U.S. 351 (1974) (widower challenged Florida statute that granted widows, but not widowers, an annual $500 property tax exemption); Schlesinger v. Ballard, 419 U.S. 498 (1975) (male naval officer challenged federal law which mandated that male officers be honorably discharged if they twice fail to gain promotion, while allowing female officers up to thirteen years of service before they would be discharged for want of promotion); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) (widower challenged a provision of the Social Security Act that provided benefits to the widow and minor children on the death of a husband, but only to the minor children upon the death of a wife); Craig v. Boren, 429 U.S. 190 (1976) (male challenged an Oklahoma law prohibiting the sale of 3.2 beer to males under 21 years of age, and to females under 18 years of age); Califano v. Goldfarb, 430 U.S. 199 (1977) (widower challenged a provision of the Social Security Act which allowed payment of survivor's benefits to a widow regardless of dependency, but which allowed payment to a widower only if he was receiving at least half of his support from his wife); Califano v. Webster, 430 U.S. 313 (1977) (male wage earner challenged Social Security Act provision that allowed women but not men to exclude an additional three lower earning years from computation of average monthly wage, which correspondingly increased female wage earner's monthly old-age benefit); Orr v. Orr, 440 U.S. 268 (1979) (divorced man challenged Alabama statute that allowed courts to award alimony to wives but not to husbands); Caban v. Mohammed, 441 U.S. 380 (1979) (father challenged a New York law that permitted an unwed mother, but not an unwed father, to block the adoption of a natural child by withholding consent); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 (1980) (widower who lost his wife in a work-related accident challenged a Missouri law which denied a widower death benefits unless he could prove dependence on his wife's earnings, but which granted a widow these benefits without proof of dependency); Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464 (1981) (male accused of statutory rape challenged California law under which only men were criminally liable for statutory rape); Rostker v. Goldberg, 453 U.S. 57 (1981) (males challenged the Military Selective Service Act, which authorized the President to require registration for military service of males but not females); Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) (male sought admission to the all-female nursing program of Mississippi University for Women). *See also* Frontiero v. Richardson, 411 U.S. 677 (1973) (servicewoman and husband challenged federal law allowing increased allowances and

from standards set by men, sex discrimination law demands that women present themselves as "similarly situated" to men before they can be considered worthy of equal treatment.[5]

Powell's dissent recognizes the *problems* in contemporary sex discrimination law, but not their *causes*.[6] He laments the loss of diversity, but fails to recognize the dangers of its reten-

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medical benefits to a servicewoman's husband only if she could prove him a dependent, while wives of servicemen received these benefits automatically).

The only area in which male plaintiffs do not dominate constitutional gender discrimination cases involves treatment of pregnancy. *See, e.g.*, Geduldig v. Aiello, 417 U.S. 484 (1974) (women challenged California Unemployment Compensation Disability Fund, designed to compensate workers for temporary disability, because it excluded pregnancy from coverage under the program); General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (class of female employees challenged company's sickness and accident benefit program under Title VII because it excluded from coverage disabilities arising from pregnancy); Nashville Gas v. Satty, 434 U.S. 136 (1977) (female employee challenged employer practice of denying sick leave to pregnant employees and also removing all of their accumulated seniority while on leave for pregnancy); *cf.* Roe v. Wade, 410 U.S. 113 (1973) (plaintiffs, a pregnant woman and a male doctor, challenged Texas abortion law making an abortion criminal unless done to save the mother's life).

5. The basic principle of equal protection law is that similarly situated persons must be treated similarly. The corollary to this proposition is that differently situated persons may be treated differently. To demonstrate that different treatment of women is discriminatory, women must prove first that they are similarly situated to men. Since maleness is the norm, and female is defined as not-male, this preliminary burden is often a considerable one. *See, e.g.*, Schlesinger v. Ballard, 419 U.S. 498 (1975), discussed *infra* at notes 148-172 and accompanying text. Both the most retrogressive and progressive decisions in sex discrimination jurisprudence start with the similarly situated requirement. *See, e.g.*, Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464, 471-72 (1981) (Rehnquist plurality concluded that young men and young women are not similarly situated with respect to the consequences of sexual activity, and thus that California's statutory rape law protects women from these dissimilar consequences by subjecting only males to criminal liability); and Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (Brennan plurality, applying strict scrutiny, concluded that a law which denied a servicewoman's husband increased benefits when she provided less than half of his support, but which provided a serviceman's wife increased benefits automatically, treated similarly situated men and women unequally). The Court in both cases required a preliminary showing that males and females were similarly situated with regard to the statutes in question.

6. *Hogan*, 458 U.S. at 735. *See also* Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In *Bakke*, Powell compared race and sex discrimination: "More importantly, the perception of racial classifiations as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share." *Id.* at 303. The question is, whose history? Why are centuries of women's oppression not considered "lengthy"? Is it not tragic that about half the country's population was disenfranchised until 1918, earns today just over half (59%) of what men earn, and is still subject to the threat and reality of rape, battering, and harassment both in and out of the home? *See* Nancy Gertner, *Bakke on Affirmative Action for Women: Pedestal or Cage?*, 14 Harv. C.R.-C.L. L. Rev. 173, 189-95 (1979); Catharine MacKinnon, Sexual Harassment of Working Women 127-41 (1979).

tion. Diversity provides a convenient rationale for unequal treatment. In the name of diversity, society has relegated women to a separate sphere. There they are taught to be feminine, a behavior that is defined by males. From the male perspective, women are inherently different from men, and therefore the law can and must treat them differently. Society and its laws are structured to account for the gender differences that men perceive, and those structures in turn perpetuate the perceived differences. Differences that men perceive are realized and reified through a social dynamic that men control. Through this pernicious circularity, the subjective experience of men becomes an "objective" reality that mirrors and confirms the male point of view, and that relegates women to a different, separate, and unequal sphere.[7]

From this vantage point, the problem lies not in whether to choose conformity or diversity, but rather in who is to choose. If the law's circle of masculine "objectivity" is to be broken, perspectives that have been excluded must be included. Inclusion of different perspectives, however, is not unproblematic. To the extent that women today *are* different from men, for whatever reason, they must negate their difference in order to be heard.[8] Society tells women that they are

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7. Objectivity both is and is not an illusion. As a value, objectivity serves as a ruse for male subjectivity. At the same time, because men have the ability and the power to conform the world to their perspective, their subjectivity becomes reified as objective. *See* Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 Signs 515, 536-44 (1982).

Men have also recognized this fact. Georg Simmel wrote in 1911:

> We measure the achievements and the commitments . . . of males and females in terms of specific norms and values; but these norms are not neutral, standing above the contrasts of the sexes; they have themselves a male character. . . . The standards of art . . . the general mores and the specific social ideas, the equity of practical judgments and the objectivity of theoretical knowledge . . .—all these categories are formally generically human, but are in fact masculine in terms of their actual historical formation. If we call ideas that claim absolute validity objectively binding, then it is a fact that in the historical life of our species there operates the equation: objective = male.

Quoted in Lewis Coser, *Georg Simmel's Neglected Contributions to the Sociology of Women*, 2 Signs 869, 872 (1977). *See also* Albie Sachs & Joan Wilson, Sexism and the Law 46-53 (1978).

8. The Supreme Court recognizes that sex stereotypes are a central aspect of sex discrimination, but, until recently, recognizes this only to the extent that the "archaic assumptions" that form the basis of the classification are shown to be inaccurate. *See, e.g.*, Reed v. Reed, 404 U.S. 71, 76-77 (1971) (striking down an Idaho law which mandated appointment of a man rather than a woman as administrator of a decedent's estate when two relatives of the same entitlement class under Idaho law applied to the court for such appointment); Califano v. Goldfarb, 430 U.S. 199, 207 (1977) (Court overturned a law allowing death bene-

different from men, but that if they want the law to treat them equally, they must be the same as men.

In light of these seemingly intractable problems, it is not surprising that male plaintiffs have dominated the sex discrimination cases heard before the Supreme Court. The Court has conceptual difficulty dealing with "different" women seeking "similar" treatment.[9] It also has difficulty recognizing the wrongs women suffer, particularly when faced with "protective" and "benign" rationales for discrimination.[10] When the contested treatment of women has an impact on men, however, the Court appears capable of perceiving the injustice.

In this article, I will examine the effects of gender perspective on the Court's decisions by analyzing several of the leading sex discrimination cases brought by male plaintiffs. In most of these cases, women participated as counsel for the male plaintiffs or as amici curiae. To that extent, the Court had the opportunity to hear women's voices. In many of the cases, the women who planned the litigation strategy purposely sought a male plaintiff. Throughout my analysis of these cases, I will try to be attentive to the limitations posed by a male court, male-constructed social norms, male-conceived judicial standards, male plaintiffs, and my own male perspective.[11]

Raising women's rights issues with male plaintiffs has

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fits to all widows, but only to widowers dependent upon their deceased spouse, commenting that the law was supported by " 'archaic and overbroad' generalizations, . . . such as 'assumptions to dependency'. . ."). Thus, women must break free from the stereotypes before they can challenge their imposition. *See* MacKinnon, *supra* note 6, at 125-26. *But cf.* Orr v. Orr, 440 U.S. 268 (1979), discussed *infra* at note 247; and Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), discussed *infra* at notes 248-292 and accompanying text.

9. *See infra* notes 78-81 and accompanying text.

10. *See* Califano v. Goldfarb, 430 U.S. 199 (1977). *Goldfarb* involved a social security provision that automatically granted survivor's insurance coverage to dependents of male workers, but granted benefits to dependents of female workers only if they could show that they received at least half of their support from the female worker. Five Justices nevertheless considered this provision discrimination against *men*, not women. 430 U.S. at 217 (Stevens, J., concurring); *Id.* at 225-26 (Rehnquist, J., dissenting). That case was litigated throughout by lawyers for the American Civil Liberties Union Women's Rights Project (ACLU WRP), who repeatedly emphasized the harms suffered by women. For a history of ACLU activity in sex discrimination cases, see Ruth Cowan, *Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976*, 8 Colum. Human Rights L. Rev. 373 (1976). Similarly, in Craig v. Boren, 429 U.S. 190 (1976), Justice Rehnquist, despite a thirty-page Women's Rights Project brief, found "no plausible argument that this is a discrimination against females." *Id.* at 220.

11. The last limitation is probably the most troubling. My criticisms of the blindered perspective of male-dominated and constructed law must, of course, extend to self-criticism. As a man, my perspectives are also skewed and lim-

caused certain distortions in the case law. Unfortunately, given the fundamental fact of a male-dominated judiciary and society, a male plaintiff is often necessary for women stating their case in court. For example, "benign" discrimination, a central problem in the struggle for women's equality, often places slight tangible burdens on men, while perpetuating substantial stereotypes concerning women.[12] In our male culture the Court often sees the tangible burden but not the harm caused by the stereotype. Male culture also obscures the dangers of paternalism. Since benign discrimination is essentially paternalistic, it is not enough for the Court, a paternal institution, to recognize women's substantive inequality. The Court must couple the recognition of women's substantive inequality with a realization that it must phrase and apply remedies and standards "neutrally." To accomplish this goal, the Court must redefine "neutral" to account for women's experience as well as men's experience.

A male plaintiff complaining of discrimination against men offers certain unwitting advantages. He forces women's rights advocates and the Court to articulate a standard of scrutiny for gender discrimination that can be applied neutrally to either sex. For the male plaintiff approach to succeed, however, the women's rights litigator must constantly emphasize that *all* stereotypic distinctions ultimately harm women, even or espe-

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ited by my gender. I face the same difficulties of empathy and understanding, and the same dangers of paternalism, that a male court does.

I have attempted to mitigate this dilemma by reading, listening to, and working with women who are lawyers, students, professors, and theorists (legal and nonlegal). I believe that the problem of communication across gender lines is greater than I can ever fathom, but I also believe (and must believe) that the gap is not complete or absolute.

To the extent that I am able to understand and demonstrate the limits of the male perspective, I am indebted to the perspectives afforded me by women. To the extent that I succeed in persuading the reader, by argument rather than unwitting example, that these limits are considerable, I will in turn be disproving my argument by my example. That is, if I, a man, can show that the male perspective *is* limited, then my example will suggest that perhaps that limitation is neither necessary nor inevitable. To the extent that I fail, I may unwittingly prove my argument by my example. For personal *and* political reasons, I would prefer the former outcome, though the latter may be, in the end, equally instructive.

12. *See, e.g.*, Kahn v. Shevin, 416 U.S. 351 (1974), discussed *infra* at notes 129-47 and accompanying text. "Benign" discrimination refers to discrimination against women that is motivated, at least superficially, not by animus but by paternalistic protectionism. In the typical example, women are relieved of a duty, barred from a profession, or afforded a benefit on the presumption that women need protection. The very term "benign" discrimination is an oxymoron that reflects a radical difference in gender perspectives. Men see it as "benign;" women feel it as discrimination.

cially those that purport to favor women. A formally neutral standard of scrutiny must recognize the effects of stereotypic distinctions if it is to respond appropriately to women's reality. The distorting effects of men's perspectives should not be underestimated at any level. The history that follows, however, demonstrates that a male plaintiff is often a useful tool when women's perspectives guide and influence the litigation. At the same time, the fact that male plaintiffs have proved so useful highlights serious pre-existing gender biases in the legal system.

II. Conceptual Frameworks—Broadening the Male Perspective

A history of sex discrimination jurisprudence cannot be adequately examined using traditional legal analysis. A historical and theoretical framework is necessary if we are to gain a broader field of vision. For that framework, I draw upon the theory and practice of feminist movements both in the United States and France.[13]

A. Feminism in the United States—Developing a Theory of Difference

The problems faced by women seeking legal redress for sex discrimination are certainly not specific to the law. Attitudes implicit in a legal doctrine that requires women to be similarly situated in order to be equally treated pervade all social spheres, private and public. Since, in the traditional scheme, men regarded women as different from men, men assigned them different tasks, such as cooking, sewing, childrearing, typing, and nursing. In the late sixties, feminists in the United States challenged these assigned tasks and roles. They recognized the role that gender stereotyping played in their oppression. They argued that "gender is a learned, or acquired, fact of social life," distinct from biological sex identity.[14] Feminists insisted that "differences" are largely learned and, there-

13. For this brief history, I draw primarily from The Future of Difference xv-xxvii, 3-121 (Hester Eisenstein & Alice Jardine eds. 1980) [hereinafter cited as Future of Difference]. Eisenstein's introduction provides an excellent overview. Part I of the collection details some of the more recent developments in the United States; part II attempts to capture some of the flavor of French feminist theory. For French feminist primary sources in translation, see Elaine Marks & Isabelle de Courtivron, New French Feminisms (1980); 7 Signs 1-86 (1981) (special section on French feminist theory).

14. Future of Difference, *supra* note 13, at xvi.

fore, can be unlearned.[15] They recognized that "different" meant unequal in a world defined by men, so they initially sought to minimize their difference from men.

With the growth of feminism, women gained the strength to speak where they had been silent. The development of women's studies programs at various colleges and universities, the affirmation drawn from consciousness-raising groups,[16] and the insistence of working class women and women of color that suburban feminism failed to account for *their* differences,[17] led to a reevaluation of early feminist attitudes toward difference. Women's studies programs were begun with the recognition that traditional and purportedly "genderless" fields of knowledge had excluded women both as practitioners and subjects. Consciousness-raising sought to uncover and confirm oppressive social structures that had been viewed as merely "personal." It also gave women a place to voice their grievances. Women researching and talking with other women of diverse backgrounds, classes, and races soon began to discover and value their differences.[18] From this new woman-centered perspective, women's differences were no longer simply an impediment to achieving success in a man's world. Feminism provided a new normative base from which women could view "maleness" as different and open to critique. Hester Eisenstein summarizes this development as one in which women have asserted the right to define difference in their own terms.[19]

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15. The requirement that women behave like ladies was a means of artificially *increasing* differences between men and women, in order to keep women in their place. An important task of feminist thinking, then, was to demonstrate that the differences between men and women had been exaggerated, and that they could be *reduced*. "Male" and "female" qualities, the argument ran, existed potentially in everyone . . . .

Id.

16. *See generally*, MacKinnon, *supra* note 7.

17. *See, e.g.*, This Bridge Called My Back: Writings by Radical Women of Color (Gloria Cherrie Moraga & Gloria Auzaldua eds. 1981); Gloria Joseph, *The Incompatible Menage A Trois: Marxism, Feminism, and Racism*, reprinted in Women & Revolution 91-108 (Linda Sargent ed. 1981); All the Women are White, All the Blacks are Men, But Some of Us Are Brave: Black Women's Studies (Barbara Smith, Gloria Hull, Patricia Scott eds. 1982).

18. *See* Adrienne Rich, Of Woman Born: Motherhood as Experience and Institution (1976); Jean Baker Miller, Toward a New Psychology of Women (1976); Dorothy Dinnerstein, The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise (1976); Mary Daly, Gyn/Ecology: The Metaethics of Radical Feminism (1978).

19. The defining of difference has traditionally been linked to the exercise of power, to those who have been in a position to say who is "different," and should therefore be subordinate. . . . If the naming of differences by the oppressor is replaced with, or at least

The assumption of a woman-centered perspective made the valuing of women's differences possible. Partially freed from male-dominated social constraints, feminist theory proliferated. In the United States, some focal points of feminist theory have been mothering,[20] reproductive rights,[21] fighting violence against women,[22] and lesbianism.[23] Each feminist approach questions a heretofore accepted male norm. In economics, for example, feminists challenge calculations that ignore the labor value of childcare and housework. Within the private realm, feminists question why men insist on viewing childbearing and childrearing as inseparable.

Women's contributions to and subversion of psychological theory are particularly revealing. Feminist inquiry uncovered a profound male bias in what psychologists had long assumed were neutral standards for research and therapy.[24] For example, psychological investigations of ego boundary development in infants stimulated new theories about the perception of difference itself.[25] Ego development—the attainment of a sense of self—requires in male children a separation from the identity of the primary childrearer, who is usually female. Male identity is thus founded upon a pre-rational separation into the binary terms of gender, and results in a positive valuation of self

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challenged and contested by, the reclaiming of difference and of individuality by the hitherto oppressed, then a step has been taken along the road to liberation.

Future of Difference, *supra* note 13, at xxiii-xxiv.

20. *See, e.g.*, Rich, *supra* note 18; Dinnerstein, *supra* note 18; Nancy Chodorow, The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender (1978); Alice Walker, In Search of Our Mothers' Gardens: Womanist Prose (1983).

21. *See, e.g.*, Diane Zimmerman, *Geduldig v. Aiello: Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Colum. L. Rev. 441 (1975); Linda Gordon, *The Struggle for Reproductive Freedom* in Zillah Eisenstein, Capitalist Patriarchy and the Case for Socialist Feminism, 107-32 (1979); Andrea Dworkin, *The Root Cause* in Andrea Dworkin, Our Blood: Prophesies and Discourses on Sexual Politics, 96-111 (1976).

22. *See, e.g.*, 8 Signs No. 3 (1983) (special issue—Woman and Violence).

23. *See, e.g.*, Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 Signs 631 (1980); Ann Ferguson, Jackquelyn Zita, and Kathryn Pyne Addelson, *On "Compulsory Heterosexuality and Lesbian Existence": Defining the Issues*, 7 Signs 158 (1981).

24. *See, e.g.*, Alexandra Kaplan & Lorraine Yasinski, *Psychodynamic Perspectives*, in Women and Psychotherapy (Brodsky & Hare-Mustin eds. 1980); Carol Gilligan, In a Different Voice (1982).

25. Nancy Chodorow, *Gender, Relation, and Difference in Psychoanalytic Perspective*; Jane Flax, *Mother-Daughter Relationships: Psychodynamics, Politics, and Philosophy*; Jessica Benjamin, *The Bonds of Love: Rational Violence and Erotic Domination* all in Future of Difference, *supra* note 13, at 3-70. *See also*, Chodorow, *supra* note 20; Dinnerstein, *supra* note 18.

as male and a negative valuation of other as female. From this male perspective, all differences take on a hierarchical ordering in line with the initial male/female differentiation. Because of gender identification with the mother, female ego development does not require such a radical separation. The boundaries between mother and daughter are considered to be more fluid and less schematic than the boundaries between mother and son. Thus, feminists in the United States have valorized their specific differences and learned to understand different ways of perceiving difference as difference.

B. French Feminism—Disruptions of Difference

French feminists have been concerned with difference since Simone de Beauvoir wrote *The Second Sex*.[26] De Beauvoir introduced the concept of woman as man's "other." In her formulation, man regards himself as the center of all things, but requires a mirroring other—woman—to reaffirm and reflect his self-regard. Today's French feminists, represented in English translation primarily by Helene Cixous, Luce Irigaray, and Julia Kristeva, also emphasize and affirm their difference, but from another perspective.[27] Their work draws on a post-structuralist philosophy that criticizes traditional philosophical notions of unity, identity, presence and the subject, and affirms in their place fluidity, production, marginality, and multiplicity. These feminists find that the value of "woman" derives precisely from women's historic marginalization. Because women exist on the outskirts of man's world, women offer new perspectives that, by their very articulation, challenge and undermine men's hegemonic centrality.

The post-structuralists[28] base their criticism of traditional metaphysics on linguistic and psychoanalytic conceptions that

26. Simone de Beauvoir, The Second Sex (H. Parshley trans. 1952).

27. *See, e.g.*, Julia Kristeva, *Women's Time*, 7 Signs 13 (1981); Helene Cixous, *Castration or Decapitation?*, 7 Signs 41 (1981); Luce Irigaray, *And the One Doesn't Stir without the Other*, 7 Signs 60 (1981). *See also* Marks & de Courtivron, *supra* note 13.

28. The following discussion focuses on three leaders of the French post-structuralist movement—all men. That the works of three men comprise so much of the foundations of French feminism is worthy of close scrutiny, but *that* subject is unfortunately beyond the scope of this article. Two points, however, remain significant for this discussion. First, these three men may be *viewed* as founders of post-structuralism as much because of their place in the French intellectual hierarchy as vice versa. Second, women theorists in any field must to some extent work with and through pre-existing theories of men, simply because men have for so long excluded women's voice. Two characteristics differentiate the French feminist women from the post-structuralist men: a

assert that all knowledge is produced and determined by relations.[29] Jacques Derrida terms this stance "deconstruction."[30] Deconstruction seeks to undermine the accepted foundations of knowledge by insisting on the relativity, subjectivity, and fluidity of language. The basic deconstructive argument is best explained in terms of definitions in a language.[31] The deconstructive critic begins with Ferdinand de Saussure's linguistic notion of definition by negative determination. "Man" is defined by what "man" is not—not-woman, not-animal, not-mineral, not-vegetable, etc.[32] These defining relations of negative determination are fluid. Words and ideas drop in and out of the vocabulary continuously, effecting slight but significant changes throughout the structure. The structure is neither complete nor static. Supplements will always be needed to fill in and expand the language system. The very terms on which traditional philosophy is based, such as identity and "objective" truth, are determined and potentially deconstructible by their negative "traces," such as non-identity, or difference, and subjective multiplicities. Deconstructive method focuses on the implicit binary pairings of traditional notions of difference and opposition. Deconstructive critique undermines the value placed upon the first term by demonstrating its reliance on the "subordinate" second term. A deconstructionist, for example, would note that, in the pairing "reason/emotion," "emotion" is devalued in relationship to the higher value placed on "reason." By demonstrating that "reason" is only meaningful by virtue of its relation to "emotion," the deconstructionist attempts to subvert the hierarchical ordering.

Jacques Lacan and Michel Foucault give Derrida's philosophical argument psychological and political weight. They argue that traditional philosophy's drive for a unifying, ordering meta-structure is determined by, respectively, male psychology or dominant political forces in society, i.e., white males.[33] According to Lacan, man imposes a "phallocentric" order upon

willingness to extend the theory along radical, transformative lines; and a more personal investment in the theory's social application.

29. What follows is another brief and reductive synthesis, this time of deconstruction and post-structuralism. *See generally* Structuralism and Since: From Levi-Strauss to Derrida (John Sturrock ed. 1979) (hereinafter cited as Structuralism and Since).

30. *See, e.g.*, Jacques Derrida, Of Grammatology (Gayatri Spivak trans. 1974).

31. *See, e.g.*, Jonathan Culler, *Jacques Derrida, reprinted in* Structuralism and Since, *supra* note 29, at 154.

32. Ferdinand de Saussure, Course in General Linguistics (W. Baskin trans. rev. ed. 1974).

33. *See, e.g.*, Jacques Lacan, Ecrits: A Selection (Alan Sheridan trans. 1977);

the world to "conquer" fears of his contingency. He does so through language, law, and social norms. The term "phallocentric order" reflects Freudian notions of the significance, to men, of the phallus and of the law of the Father. It suggests that such inflated notions are intimately connected to man's desire to know and control his world. The "phallocentric" order cannot fulfill man's desires for control, however, because its meaning is determined negatively by the differences it creates. Rigidly "phallocentric" discourse is ultimately unable to encompass an ever-changing, fluid world. As a result, a "phallocentric" world-view treats difference either by incorporation or projection. Incorporation implies assimilation, and the failure to recognize the existence of difference. Projection relegates the non-incorporable to the margins. But the center is determined by its margins, and therefore that which underlies the system (insofar as the system is negatively determined by exclusion) is simultaneously that which potentially undermines and subverts order. Lacan's psychoanalytic model analogizes the non-incorporable margins to the unconscious, which although repressed, always strives to return in order to disrupt the conscious.

Foucault applies these philosophical and psychological insights to various socio-political systems.[34] He seeks to discover how power operates in society, i.e., how it transmits itself through the rules and orders of any given social scheme. He, too, focuses on the margins, on those who have been silenced or ignored. He sees the margins of order as a source of disruption of the status quo.

In a male-dominated society, men define the autocratic center that excludes or represses women. Women, to the extent that they recognize their repression, have little invested in the phallocentric order and its accompanying notions of identity, unity, and authority. Women therefore have a potentially subversive role—to speak up from the margins, to assert and affirm their difference, to challenge an order that cannot assimilate the contradictions they pose. Women's self-asserted difference challenges a male order that has long insisted on their silence and exclusion. Luce Irigaray celebrates the "multiple nature of female desire and language," setting it against the

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Michel Foucault, The Archaeology of Knowledge (A.M. Sheridan Smith trans. 1972); Michel Foucault, The History of Sexuality (Robert Hurley trans. 1978).

34. Michel Foucault, Discipline and Punish: The Birth of the Prison (Alan Sheridan trans. 1977); Michel Foucault, Madness and Civilization: A History of Insanity in the Age of Reason (Richard Howard trans. 1965).

rigid order of phallocentric desires for control, authority, and dominance.[35] Helene Cixous argues that since the traditional conception of difference as "dual, *hierarchized* oppositions" is based on the male/female dichotomy, women's subversion of that hierarchy will undermine all phallocentric order.[36] Thus, Cixous calls upon woman "to write her self," to "put herself into the text—as into the world and into history—by her own movement."[37] French feminists, then, insist not only on their difference, but also on the potentially radical challenge that their differences pose to the established order. From this point of view, assimilation is the greatest danger.

C. The Instrumental and Operational Ideology of Law

The law, from the modern perspectives of feminists in the United States and France, is inextricably tied to maleness. In instrumental terms, the law serves male interests. In functional terms, it operates like a man's mind. The law of the Father and the law of the courts mirror and support one another. Law is "phallocentric;" it strives to impose order on a disordered world through the dual movements of incorporation by assimilation and relegation through exclusion.[38]

Feminists identify certain ideals central to the rule of law, such as objectivity, individualism, and rights, as specifically male. The French feminists base this claim on the foregoing critique of metaphysics, and the function of the law of the Father. Law privileges objectivity, individualism, and rights over their binary opposites, subjectivity, collectivity, and responsibility, and this privilege is identified with the more general male privilege over females.[39] The privileged terms constitute a phallocentric legal order, defined by men's notions of difference, and deconstructible by women's articulated differences.

The perspectives afforded by feminist theory in the United States supports the connection of man and law on somewhat different, more pragmatic grounds. First, as a historical matter, men developed and defined the rule of law, and thus it necessarily reflects their interests. Second, feminist psychological

35. Luce Irigaray, *Ce sexe qui n'en est pas un, reprinted in* Marks & de Courtivron, *supra* note 13, at 99, 104-05.
36. Helene Cixous, *Sorties, reprinted in* Marks & de Courtivron, *supra* note 13, at 90, 91.
37. Helene Cixous, The Laugh of the Medusa, *reprinted in* Marks & de Courtivron, *supra* note 13, at 245.
38. *See supra* text accompanying notes 33-34.
39. Cixous, *supra* note 36.

research provides evidence for the identification of such bedrock legal norms as autonomy, rights, and objectivity with particularly male interests. Whether due to ego development[40] or later social factors, studies indicate that boys and men in our society tend to be more individualistic and rights-oriented in their moral thinking, while girls and women emphasize connections and responsibilities.[41] Third, feminist scholars in the United States have, in a wide range of fields, begun to explore what is lost by the unquestioning assent to norms of objectivity and rationality in academic research.[42] Thus, feminist theory uncovers a male bias to the very ideological foundations of our legal tradition.[43]

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40. *See supra* notes 24-25 and accompanying text.

41. *See supra* notes 24-25 and accompanying text. Carol Gilligan's studies in developmental psychology indicate that boys' and girls' moral development evolve along separate paths. Boys, in Gilligan's findings, tended to be more individualistic and rights-oriented at the outset, regarding responsibility as impinging on their personal sphere of autonomy. Girls, on the other hand, begin with a stronger sense of connection and responsibility to others and a weaker sense of individual rights. Gilligan assumes the end of the development involves an interplay of rights and responsibilities, but her studies indicate that women and men get there differently, if they get there at all. Carol Gilligan, In a Different Voice (1982).

Chodorow and Dinnerstein insist that the reasons for these divergent developmental paths are socio-psychological, i.e., they are due to a social scheme that assigns childrearing to a single sex. *See* Chodorow, *supra* note 20 and Dinnerstein, *supra* note 18. There may also be an important cultural element involved, suggested by tentative findings of Dr. Ana Cauce, professor of clinical psychology. Cauce found substantially more recognition of connection and relations among a sample of lower-class Black boys than did Gilligan in her upper middle-class white sample. It may be that "individual rights" thinking is only culturally "inherent" in white upper and middle class males, i.e., those who have the most invested in notions of separate spheres. Interview with Dr. Ana Cauce, professor of clinical psychology at the University of Delaware, in New Haven, Connecticut (March, 1983).

42. *See* MacKinnon, *supra* note 7, at 537 n.52, and works cited therein. *See also* Evelyn Fox Keller, *Feminism and Science*, 7 Signs 589 (1982); Benjamin, *supra* note 25, at 45-46. MacKinnon links objectivity as stance to objectification as method. Keller links differentiation to the development of scientific objectivity. Benjamin's article concerns themes of rationality and male developmental conflicts around autonomy and recognition. *See also* Ann Freedman, *The Equal Protection Clause, Title VII, and Differences Between Men and Women: A Critique of the Jurisprudence of Sex Discrimination* (forthcoming in Yale Law Journal).

43. Some men also recognize the shortcomings and biases of the objective model of legal reasoning. Men generally criticize the objective model with respect to race and class issues, however, rather than gender. It seems that we upper and middle-class white men are most blind to those closest to us. *See, e.g.*, Alan Freeman, *Truth and Mystification in Legal Scholarship*, 90 Yale L.J. 1229 (1981); Paul Brest, *Interpretation and Interest*, 34 Stan. L. Rev. 765 (1982); Owen Fiss, *Groups and the Equal Protection Clause*, 5 J. of Phil. and Public Affairs 107 (1976) [hereinafter cited as *Groups*].

Fiss is particularly insightful about the relation between the substantive

Implicit in feminist theory is a further critique which suggests that the very operation of law can be identified as masculine. The law is not only an instrument of male ideology; it operates *as an ideology*. Feminist critic Susan Griffin has described ideology as that which requires an "other."[44] The "other," from the ideologue's perspective, is necessarily an enemy. Ideology, in Griffin's view, holds the promise that one can control reality with the mind: "This is the way of all ideology. It is mind over body. Safety over risk. The predictable over the surprise. Control over emotion."[45] Such control has been and will be impossible, so ideology creates an "other" out of that which threatens to disrupt it: nature, creativity, the body, women, the insane, the criminal.[46] Griffin's description of this ideological process resonates with echoes of dispute resolution:

> Here then is another aspect of ideological structure. Dialogue—which is finally perhaps the form of all thought—must become a war. One must lose and the other win. There must be a clear victor. One must be shown to be wrong. And therefore, each kind of thought is pitted against the other. The listener must choose between one and the other, either a truth or a falsity.[47]

The slight contemporary movement in the legal system, away from dispute resolution models to structural reform[48] or

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definitions of equality and the institutional procedures of adjudication. He suggests that the antidiscrimination principle may be based on the notion of the blindfolded icon of justice. *Id.* at 119. Both are presumed to be objective and value-free, insist on color-blindness, and focus on individuals and the rationality or fit of means to ends. *Id.* at 118-28. "It is natural for the [Supreme Court] Justices to seize upon the ideal of their craft in setting norms to govern others. Their craft sets limits to their horizons, it influences their choice among the many meanings of equality." *Id.* at 120. Fiss' alternative "group-disadvantaging principle," however, is paternalistic in the extreme. *See infra* note 50. Fiss is not ready to give up the ideal of objectivity. *See* Owen Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982).

In essays published in 1911, Georg Simmel, meanwhile, was well ahead of his time in recognizing the male bias in objectivity, but his solutions were sharply circumscribed by traditional nineteenth century assumptions about woman's place. Coser, *supra* note 7, at 874-76.

44. Susan Griffin, *The Way of All Ideology*, 7 Signs 641 (1982).

45. *Id.* at 647.

46. *Id.* at 644-45.

47. *Id.* at 651.

48. *See generally*, Owen Fiss, *The Supreme Court, 1978 Term, Foreword: The Forms of Justice*, 93 Harv. L. Rev. 1 (1979). Professor Fiss' notion of "structural reform" involves a legal response to the growing bureaucratization of the state. The traditional legal model of dispute resolution envisioned a pair of autonomous litigants seeking the passive decision of a neutral arbiter. Structural reform takes into account the pervasive role of law and government in today's society. Structural reform emphasizes the alteration of social relations that a legal decision can cause, and calls on judges to take a more active role to en-

public law litigation,[49] may solve some of the problems that feminists have uncovered. The shift in normative legal models represents a recognition of feminist ideals such as social interconnection and far-reaching responsibilities, ideals heretofore largely ignored by law. Moreover, these new legal models are less defined and confined by the ideological confrontation that Griffin describes. But structural reform models have their own problems. From the feminist perspective, the most important problem with structural reform is its inherent paternalism.[50] These models grant the judge considerable discretion and rely ultimately on *his* perception of the scope of the problem. The judge orchestrates the trial and calls in intervenors, special masters, and the like, whenever appropriate. Structural reform is the law of a very powerful father.

But paternalism is by no means unique to the public law or structural reform models. It may be inherent in the conception of law itself. Insofar as law is an act of authority "for the good" of the people acted upon, an act whose legitimacy rests on something other than full and free consent, law may be pa-

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sure that all social interests are represented in litigation. Structural reform also justifies legal remedies that go far beyond declaring a winner. It calls for remedies that affirmatively restructure social institutions (e.g., school desegregation decrees, prison reform, etc.).

49. Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976). Women's groups engaged in public law litigation include: American Civil Liberties Union Women's Rights Project (New York City); American Civil Liberties Union Southern Women's Rights Project (Richmond); Center for Constitutional Rights (New York City); Center for Law and Social Policy, Women's Rights Project (Washington, D.C.); Connecticut Women's Legal Education Fund (New Haven); Equal Rights Advocates (San Francisco); Mexican-American Legal Defense and Education Fund Chicana Rights Project (San Francisco); National Women's Law Center (Washington, D.C.); Northwest Women's Law Center (Seattle); National Organization for Women Legal Defense and Education Fund (New York City); Women's Justice Center (Detroit); Women's Law Fund (Cleveland); Women's Law Project (Philadelphia); Women's Legal Defense Fund (Washington, D.C.).

50. See, for example, Owen Fiss' group-disadvantaging principle, which he offers in place of the anti-discrimination principle. Outlining the disadvantages heaped on Blacks by past discrimination, Fiss calls for "special judicial solicitude on their behalf," asserting that the courts are to "amplify the voice of the powerless minority." Fiss, *Groups, supra* note 43, at 153. Fiss never questions the effects white men's amplifications might have on Black people's voices (e.g., silence, distortions). Others have been more sensitive to the problem. *See* Derrick Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 Yale L.J. 470 (1976). The problem of speaking *for* others is perhaps greater in the realm of gender discrimination than race discrimination, precisely because "discrimination against women has always been ostensibly benign, done in the guise of protecting women, compensating for their physical frailties or making allowances for their special contributions to society." Gertner, *supra* note 6, at 182.

ternalistic by definition.[51]

Successful paternalism is hegemonic; it no longer looks like paternalism.[52] Authority is institutionalized, consent is socialized. Paternalism speaks for society's subordinate groups, but successful paternalism need not speak because the subordinate groups will speak in the dominant group's terms. Hegemonic paternalism requires the illusion that all are subject equally to the law; the law's "punctilious attention to form" and procedure contributes to the maintenance of the illusion.[53] "Equality" before the courts rationalizes the inequalities in the underlying social structure.[54]

The existence of a critique of paternalism, indeed the very word "paternalism," suggests that paternalism is not wholly successful or hegemonic. Spokespersons for subordinate groups do speak out, and in speaking, they challenge the authority of paternalism. Their challenge is an assertion of difference, and therefore requires the adoption of a perspective at least partially free of hegemonic coloring. In a study of eight-

51. *See* Mark Tushnet, *Sociology of Article III: A Response to Professor Brilmayer*, 93 Harv. L. Rev. 1698, 1724 n.107 (1980). Tushnet responds to Professor Lea Brilmayer's concern for legal advocates' paternalism by, first, misreading paternalism as altruism, and second, arguing that Brilmayer's standing requirements are no guarantee against paternalistic results. The latter argument seems sound. However, the prior misreading, and Tushnet's alternative "barebones" approach, which affords significant paternalistic power to the judge, suggests that Tushnet, a man, is not nearly as concerned with paternalism as is Brilmayer, a woman. Is this merely a coincidence? *See* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the 'Case or Controversy' Requirement*, 93 Harv. L. Rev. 297 (1979).

52. On hegemony, see Antonio Gramsci, Selections from the Prison Notebooks of Antonio Gramsci at 181-82, 195-96, 246-50 (Quintin Hoare and Geoffrey Smith trans. 1971). Gramsci defines hegemony as a union of political, intellectual, economic, and moral aims within a social fabric. Successful hegemony, in Gramsci's conception, is teleological, i.e., defined by its end state, but the process to the end is all-important. He distinguishes two paths to hegemony: (1) transformism, which envisions an assimilation of subordinate allied classes into the dominant one, and (2) expansive hegemony, requiring an active consensus, articulating the subordinate classes' interests in such a way as to promote their full development. *See* Chantal Moufe, *Hegemony and Ideology in Gramsci* in Gramscí and Marxist Theory 168, 182-83 (Chantal Moufe ed. 1979). It is interesting that the latter definition has more or less dropped out, and hegemony, as generally used today, refers only to the former, more paternalistic concept. *See, e.g.*, Eugene Genovese, Roll, Jordan, Roll: The World the Slaves Made, ch. 2 (1974); MacKinnon, *supra* note 7, at 537 ("Aperspectivity is revealed as a strategy of male hegemony"); Diane Polan, *Toward a Theory of Law and Patriarchy* in The Politics of Law: A Progressive Critique 298-300 (David Kairys ed. 1982).

53. Douglas Hay, *Property, Authority and the Criminal Law* in Albion's Fatal Tree (E.P. Thompson ed. 1975), *excerpted in* Robert Cover & Owen Fiss, The Structure of Procedure 451, 456 (1979). *See also* Sachs and Wilson, *supra* note 7.

54. Sachs and Wilson, *supra* note 7, at 52.

eenth century English peasants, historian Douglas Hay has documented how the paternalistic ideology of "justice" can reveal itself when close personal ties are broken.[55] In eighteenth century England, the ties were remnants of feudalism; today, the ties that are loosening are those of the family.

The articulation of difference, and the rejection of legal paternalism, are simultaneously signs and causes of social change. A second English historical example demonstrates the transformative power of disruptive challenges to hegemony. Before 1921, the British judiciary had consistently barred women from political and professional office. It did so by refusing to include women in the definition of "persons."[56] The law allowed only "persons of full age" to hold office or be solicitors, and women, the courts consistently ruled, were not "persons." Women's response to being defined out of "personhood" demonstrates dramatically how the assertion of difference disrupts paternalism. Suffragette women, challenging the notion that a male judiciary could act impartially, refused to play by the rules, and "hurled books, chairs, shoes and ink-bottles at the magistrates."[57] In 1929, the law was amended, and women became "persons."

From the feminist perspective, law is identifiably male, in

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55. They had come to London from the country, and in doing so left behind the close and persisting personal relationships that still characterized much of English society. And it was in such intimate dealings of fear and gratitude that much of the ideology of justice was realized. Some historians have suggested that "urban alienation" accounts for London disorder and crime in the eighteenth century. It may be more correct to say that the instruments of control there were weaker, in part because the class relationships that fostered deference were. Resistance to the law, disrespect for its majesty, scorn for its justice were greater. Equally, judicial mercy in London was more often a bureaucratic lottery than a convincing expression of paternalism.

Hay, *supra* note 53, at 461.

56. Sachs and Wilson, *supra* note 7, at 12-45.

57. Scores of suffragette women indicated by their conduct in court that, to put it at its politest, they had withdrawn any legitimacy which they might formerly have accorded the judiciary. They shouted till they were hoarse, and some when they could shout no more hurled books, chairs, shoes and ink-bottles at the magistrates. . . . They were deliberately disputing the notion that where women were challenging the dominion of men, they could expect male judges, lawyers, policemen, prison officers and doctors to function impartially. The women declared in word and action that they would not be bound by a constitution that refused to accord to them the status of being persons in public life. To submit to being tried by a body established by the constitution was to concede its legitimacy in advance. The issue was whether men should decide whether women could decide.

Id. at 47.

its implicit substantive norms, its adversarial operation, and its paternalistic remedies. The law reflects male "value judgments" so deeply and pervasively that male values begin to look like neutral normative standards. The feminist perspective exposes the substance and procedure of law as inherently male-biased. A feminist critique articulates standards from a woman's point of view, and in so doing, undermines the law's illusion of objectivity.

D. Contemporary Women's Perspectives on Sex Discrimination Law

The woman's point of view does not stop at the level of systematic critique set forth in the preceding section. It cannot afford to stop there. Mere criticism affirms by negation the foundation of the object of criticism. Moreover, (some) women have everything to gain through the creation of alternatives to the present hierarchical system.[58] Thus, many legal commentators have recently attempted to define a "feminist jurisprudence,"—a model for equality that accounts for women's point of view without negating its difference. They have presented new perspectives on the wrongs that society and its laws inflict upon women. These perspectives suggest new solutions to such important wrongs as sexist stereotypes,[59] pregnancy discrimination,[60] rape laws,[61] employment discrimination,[62] sexual harassment,[63] and discrimination in athletics.[64] Their alternatives are far from monolithic. Indeed, the women's movement's emphasis on difference is antithetical to monolithic solutions.[65]

58. Other women, because of their position in the hierarchy relative to other races and classes, have an investment in at least part of the unequal status quo. Thus, the class of women is problematically united—Phyllis Schlafly and Andrea Dworkin coexist uneasily. *See* Andrea Dworkin, Right-Wing Women (1983).

59. Nadine Taub, *Keeping Women in Their Place: Stereotypes Per Se as a Form of Employment Discrimination*, 21 B.C.L. Rev. 345 (1980).

60. Ann Scales, *Towards a Feminist Jurisprudence*, 56 Ind. L.J. 375 (1981); *see generally*, Nadine Taub, *Symposium on Reproductive Rights: the Emerging Issues*, 7 Women's Rts. L. Rep. 169 (1982).

61. Catharine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 643-55 (1983).

62. Taub, *supra* note 59; Note, *Toward a Redefinition of Sexual Equality*, 95 Harv. L. Rev. 487 (1981); Kathryn Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 Wis. L. Rev. 55 (1979).

63. MacKinnon, *supra* note 6; Nadine Taub, Book Review, 80 Colum. L. Rev. 1686 (1980) (reviewing Catharine MacKinnon, Sexual Harassment of Working Women (1979)).

64. Lyn Lemaire, *Women and Athletics: Toward a Physicality Perspective*, 5 Harv. Women's L.J. 121 (1982).

65. *See supra* notes 33-37 and accompanying text. A monolith is by definition

Still, these commentators share some common ground. Each argues that the prevailing male legal standards fail to address the specific problems of women. Each insists that objective and formal judicial definitions of equality are not generic but gendered. In the place of prevailing judicial definitions, they offer notions of equality that focus on participatory values rather than individualistic ideals. They offer notions of equality that emphasize the interdependence of women and men in this society.[66] They demand that the law accommodate those biological differences that do exist between women and men, but they remain wary of the law's ability to accommodate biological differences without perpetuating socially imposed "otherness."[67] Finally, each insists that the law recognize women's substantive claims of inequality, but expresses concern that the law's recognition of discrimination in one sphere may only perpetuate paternalism in another.[68]

The spectre of paternalism seems almost inescapable. If the law fails to recognize women's difference, as it has done in the pregnancy cases,[69] a "neutral" policy will treat women unequally. If the law recognizes women's difference, the "solution" will likely have the stereotypic effects of condescendingly "benign" or "protective" legislation.[70] In the former case, women are ignored; in the latter, they are acted upon. The intermediate goal of the feminist legal commentators is to infuse women's perspective of difference into the law as it stands. The final goal, though, is for women to *act*, as women, from a woman-centered perspective. As long as women remain vastly underepresented in the judicial and legislative branches of gov-

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phallocentric; successful toppling of the monolithic order may require multiple attacks from all sides. To counterpose an alternative monolith is to invite war, and, in man's world, defeat.

66. Powers, *supra* note 62; Lemaire, *supra* note 64.

67. Scales, *supra* note 60; Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rts. L. Rep. 175 (1982); Catharine MacKinnon, Book Review, 34 Stan. L. Rev. 703 (1982) (reviewing Ann Jones, Women Who Kill (1980)).

68. *See* Williams, *supra* note 67, at 176-79; Taub, *supra* note 59.

69. *See infra* notes 78-81 and accompanying text.

70. The oft-quoted distinction between pedestal and cage, first articulated in the law in Sail'er Inn v. Kirby, 5 Cal. 3d 1, 20, 485 P.2d 529, 541 (1971) ("The pedestal upon which women have been placed has all too often, upon closer inspection, been revealed as cage."), and repeated by Justice Brennan in *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973), is a revealing choice of metaphors. Both the pedestal and the cage are instruments of objectification. Men, as subjects, place objects on pedestals and in cages, so they can look at the objects. One does not put oneself on a pedestal or in a cage; one is put there by another. In this sense, both the cage and the pedestal envision man as the acting and perceiving subject, and woman as the passive, watched object.

ernment, the problem of paternalistic perspectives will remain.[71]

The foregoing critique of traditional jurisprudential norms and procedures suggests that women's rights litigators face considerable problems of communication. They must first undermine paternalistic notions of women's stereotyped difference. If they seek only to negate male notions of female difference, however, they risk assimilation into male culture. Moreover, feminist theory suggests that the most potentially powerful challenge that women pose lies in their actual difference. Thus, the women's rights litigator is caught in a double bind. Without the positions of power from which to speak and act affirmatively, she must nonetheless infuse the prevailing perspective with radically affirmative notions of women's difference. The historical analysis that follows illustrates one particularly consistent response to this bind: the use of male plaintiffs to present issues of women's rights.

III. Litigating in a Man's World—Ruth Ginsburg and the Strategy of Perspective

A. Overview

The Supreme Court did not recognize and uphold a claim of sex discrimination until 1971, in *Reed v. Reed*.[72] Prior to *Reed*, the courts had routinely denied complaints of sex discrimination. The Court frequently cited women's differences from men as a justification for treating them differently.[73] The

71. In March 1982, there were forty-seven women and 623 men in the federal judiciary. By December 1983, the proportion of women had inched up to eight percent. Susan Ness, Report of National Conference of Women's Bar Associations, Report on the Progress of Women in Federal Judicial Selection (Dec. 3, 1983). As of January 15, 1983 President Reagan had appointed 89 federal judges, of which 82 were white males and four were women. President Carter appointed 152 federal judges, of which 40 were women. *Reagan's Judicial Selections Draw Different Assessments*, 41 Cong. Q. Weekly Rep. 83 (Jan. 15, 1983). In 1975, there were 10 females and 573 males in the federal judiciary, and on the highest state courts, four of 315 judges were women. *See* Susan Tolchin, *The Exclusion of Women from the Judicial Process*, 2 Signs 877 (1977) (figures from 1975).

72. 404 U.S. 71 (1971). *Reed* held that a statutory preference afforded to males as administrators in decedents' estates violated the equal protection clause of the 14th amendment.

73. *See, e.g.*, Bradwell v. State, 83 U.S. (16 Wall.) 130 (1873) (Court upheld a statute denying women the right to practice law, citing the "peculiar characteristics, destiny and mission of woman" to be "wife and mother." (Bradley, Swayne & Field, J.J., concurring)); Muller v. Oregon, 208 U.S. 412 (1908) (Court upheld a statute barring factory work by women for more than 10 hours a day, citing differences between men and women in physical strength, duties, capac-

legal situation in the late sixties and early seventies mirrored the social framework; men saw women as different from men, and men's laws kept women different from men. Feminists recognized this reality in formulating their legal strategies. Their predominant goal was to minimize the perceived differences between the sexes, and to show that many of the differences that did exist were not biologically inherent but were instead socially learned through sex stereotyping.

Ruth Bader Ginsburg orchestrated much of this strategy at the Supreme Court level through her role as director of the American Civil Liberties Union Women's Rights Project (ACLU WRP).[74] Ginsburg and the Women's Rights Project contributed to nearly every sex discrimination case decided by the Court during the seventies. Ginsburg sought to educate the Court about the insidious effects and pervasive nature of false stereotypes that labeled women and men as inherently different. Since she perceived her strategy as one of minimizing any differences between the sexes, she could make her arguments in support of either a male or female plaintiff. Her briefs consistently characterized sex stereotypes as double-edged. She argued that rigid sex roles limited opportunities for freedom of choice and restricted personal development for members of both sexes.[75] The sex stereotypes that she challenged often formed the basis for discrimination that was allegedly "benign": from the Court's perspective, the stereotypes limited women's development in at most an indirect way, while directly burdening men in a legally cognizable way.[76] In such situa-

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ity for long periods of labor, and self-reliance); Goesaert v. Cleary, 335 U.S. 464 (1948) (Court upheld a statute that denied bartender's licenses to women unless related to male bar owner, noting the need for the protective oversight of a male owner); Hoyt v. Florida, 368 U.S. 57 (1961) (Court sustained a statute that allowed women to be placed on a jury list *only* if the woman specifically requested to be on the list, noting that "woman is still to be regarded as the center of home and family life").

74. *See* Cowan, *supra* note 10, at 384. In most cases, Ginsburg and the Women's Rights Project acted as either plaintiff's counsel or amicus curiae. *Id.* at 374.

75. Ruth Ginsburg, *Gender and the Constitution*, 44 U. Cin. L. Rev. 1, 22 (1975); Ruth Ginsburg, *Sex and Unequal Protection: Men and Women as Victims*, 11 J. Fam. L. 347, 358-362 (1971).

76. Sometimes both of these considerations were relevant. Ruth Cowan reports in her discussion of the Women's Rights Project's handling of *Frontiero, Wiesenfeld*, and *Goldfarb*

> [n]ot irrelevantly, they attacked a stereotype with an attractive offer of benefits for men. The purpose of these issues, the WRP claimed, was to show that the real issue was not a narrow women's rights question, but a question about people's freedom to organize their lives on the basis of their own judgement. The WRP hoped to

tions, a male plaintiff enabled the Court to reach what was primarily a women's issue. Ginsburg chose to litigate issues that she could frame as hurting both men and women, rather than issues, like pregnancy discrimination, where the harm fell on women alone. She sought to deny women's "difference;" this strategy both limited her range and increased her chances for success.

Ginsburg's classic argument was to insist that women were like men. She sought to show that women were similarly situated, but that society had treated them differently because of stereotypical "old notions" and "archaic assumptions" about sex roles. Where the Court was likely to view, or the government to defend, a discriminatory classification as benign, she argued on behalf of a male plaintiff. In her largely successful effort to plan and carry out a cohesive, unified strategy, she acted in "phallocentric," or male ways. Rather than bombard the Court with differences and multiplicities, Ginsburg sought to present the legal arguments for women's rights from a single viewpoint. Ginsburg thus used both legal argument and her own personal example to establish the then-radical notion that women are similar to men. She placed herself in the dominant male culture and argued to men, and for men, on behalf of women's general inclusion. She played by men's rules, and she prevailed.

Nevertheless, Ginsburg's assimilationist method could not address the entire range of women's rights issues. Assimilation is most obviously an insufficient response to issues of reproductive freedom. In this area, women are biologically different, and therefore, women must be treated differently to be treated equally.[77] The Supreme Court apparently understood Ginsburg's "women are like men" argument but has had much greater difficulty with the "women are different" approach that reproductive rights requires.[78] Feminist legal scholars, faced

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demonstrate that men and women both suffer from the 'traditional line.'

Cowan, *supra* note 10, at 394.

77. *See* Scales, *supra* note 60.

78. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973); Geduldig v. Aiello, 417 U.S. 484 (1974); General Electric Co. v. Gilbert, 429 U.S. 125 (1976); Nashville Gas v. Satty, 434 U.S. 136 (1977).

Stewart's majority opinion in *Geduldig*, 417 U.S. at 496-497 n.20, and Rehnquist's in *Gilbert*, 429 U.S. at 133-39, illustrate a long-standing feminist critique of the law, i.e., that in law, *man* is the measure. *See* Williams, *supra* note 67, at 175. Just as Sigmund Freud thought women were men without penises, Rehnquist and Stewart treated women as men who get pregnant. Analyst and jurist alike were blinded by their assumption that maleness is the standard for all hu-

with the reality of difference that pregnancy discrimination presents, have attempted to expand notions of equality to encompass this distinctive female function, but the courts have not been quick to respond.[79] Similarly, other less biologically rooted but socially significant gender differences require a "women are different" approach. They require an approach that accounts for women's differences without paternalistically perpetuating those differences as weaknesses.[80] Ultimately, or at least as long as men dominate the judiciary, an adequate adjudicative solution may not be possible.[81] Playing by men's rules has its penalties.

Still, by women's or men's standards, Ginsburg's assimilationist approach has accomplished a great deal. It has unsettled men's notions about women's separate sphere. The Court apparently now understands some of the wrongs perpetuated by stereotypical notions of "difference," as well as some of the difficulties involved in redressing those wrongs. The use of male plaintiffs to educate the Court was in part necessary and in part a strategic choice. In adopting a strategy to litigate on behalf of women's similarity and against the imposition of stereotyped difference, Ginsburg faced significant constraints. General male assumptions, such as the protective nature of benign discrimination, and specific legal doctrine imposed limitations upon Ginsburg's strategy.

The procedural requirements of standing to sue provide

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manity. This reading is confirmed by the seemingly anomalous result in *Nashville Gas*, allowing the gas company to deny sick pay to pregnant women, but striking down a policy which terminated all her accrued seniority upon pregnancy leave. *Nashville Gas*, 434 U.S. at 143, 145. Thus, "insofar as a rule deprives a woman of benefits for actual pregnancy, that rule is lawful under Title VII. If, on the other hand, it denies her benefits she had earned while not pregnant (and hence like a man) and now seeks to use upon return to her nonpregnant (male-like) status, . . . it is not lawful." Williams, *supra* note 67, at 192-93. "The practical message to employers is: 'If a woman is pregnant, you may treat her as you please. Once she's no longer pregnant, treat her as a person.'" Scales, *supra* note 60, at 387-88.

79. *See* Scales, *supra* note 60 and Taub, *supra* note 60.

80. The most intractable problem arises where stereotypes are so strong that they are women's reality, i.e., they are "true," at least for the time being. For example, it may be "true" in the present day that women are on average less aggressive and better nurturers than men are, but these are nonetheless stereotypes. Such strong stereotypes are self-perpetuating, real, but most importantly, severely limiting.

81. *See* Williams, *supra* note 67, at 175. Congress recognized women's particular needs regarding pregnancy discrimination by enacting the Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (current version at 42 U.S.C. § 2000(e) (1976)). *See* Aryeh Neier, Only Judgment: The Limits of Litigation in Social Change 109 (1982).

an example of how seemingly neutral legal doctrine can present obstacles to the litigation of women's rights. In all of the cases that the WRP has argued before the Court, women's rights were presumably the central concern. In *Kahn v. Shevin*,[82] for example, the WRP undoubtedly had little concern for the extra fifteen dollars added to Mel Kahn's annual tax bill because Florida gave widows, but not widowers, a limited property tax exemption. Similarly, in *Craig v. Boren*,[83] the WRP did not participate simply to protect the right of eighteen to twenty-one year old boys to buy 3.2 beer in Oklahoma. In all of the cases discussed below, women suffered the critical wrongs, but men were the legal complainants. Use of a male plaintiff was the only way, in many cases, to meet standing requirements. Because the Court did not yet recognize the harm women suffered, a male plaintiff who suffered pecuniary harms was essential. Ginsburg's approach had to be indirect.

Standing requirements dictate that women seeking to enjoin the governmental imposition of a disabling stereotype must first locate an individual who is harmed in some "direct," albeit insignificant fashion. They must next show that this "direct" harm is due to a decision based on the disabling stereotype.[84] Direct pecuniary harm often seems to fall on men, since

82. 416 U.S. 351 (1974), discussed *infra* at notes 129-47 and accompanying text.

83. 429 U.S. 190 (1976), discussed *infra* at notes 219-47 and accompanying text.

84. The Supreme Court, in oft-criticized opinions setting forth the allegedly "constitutional" requirements of standing, requires a showing that plaintiff is injured in fact (in order to guarantee plaintiff's personal stake in the controversy), and a further showing of causal connection between defendant's act, plaintiff's harm, and the potential relief. *See* Warth v. Seldin, 422 U.S. 490, 498-502 (1975); Linda R.S. v. Richard D., 410 U.S. 614, 616-17 (1973); Flast v. Cohen, 392 U.S. 83 (1968). The latter "causation" requirement, in particular, has been denounced by commentators as a dishonest method of prematurely deciding the merits of a turned-away plaintiff's case. *See, e.g.*, Abram Chayes, *Foreward: Public Law Litigation and the Burger Court*, 96 Harv. L. Rev. 4, 8-26 (1982); Tushnet, *supra* note 51, at 1708.

Interestingly, a secondary issue of standing in many of these sex discrimination cases—the right of a plaintiff to raise third parties' rights—was hardly broached. *See, e.g.*, Tileston v. Ullman, 318 U.S. 44 (1943) and McGowan v. Maryland, 366 U.S. 420 (1961). *Cf.* Barrows v. Jackson, 346 U.S. 249, 257 (1953) ("Under the peculiar circumstances of this case, we believe the reasons which underlie our rule denying standing to raise another's rights, which is only a rule of practice, are outweighed by the need to protect the fundamental rights which would be denied by permitting the damages action to be maintained"). It is now generally accepted that a party may raise a third party's rights where (1) the plaintiff has a close relationship to those whose rights are sought to be asserted, and (2) where the third party confronts "some genuine obstacle" in asserting his or her rights. *See* Singleton v. Wulff, 428 U.S. 106, 114-16 (1976).

That this issue was rarely raised may be due in part to Ginsburg's success in convincing the Court of the complex double-edged nature of the discrimination involved. It may also reflect opposing counsel's and the Court's frequent

much of the legally cognizable discrimination inflicted upon women is "benign." Standing rules thus require a circuitous path to the issues of women's rights, and result in an equally circuitous test on the merits.

The Court still does not condemn the imposition of stereotypes per se. Instead, it recognizes stereotypes as invalid only where: (1) they are shown to be false;[85] and (2) they are shown to be the motivating factor behind a gender-based classification that directly harms someone economically. This approach redresses the injury of stereotypes belatedly and indirectly. The injury is redressed only *after* the stereotypes are no longer disabling (and are thus false), and only through their direct pecuniary effect on a male intermediary. Thus, a certain inevitable distortion inheres from the outset, because the male-formulated, "neutral" requirements of standing cannot take into account a central aspect of women's discrimination—the stigmatic and immobilizing harm of stereotypes per se.[86] As the cases that follow will demonstrate, the distortions caused by standing doctrine are only a specific instance of a more general problem. Distortion is inescapable when a woman addresses an area that claims impartiality but that was created by and for men.

B. Frontiero v. Richardson—*Peripheral Man*

The first significant sex discrimination case to feature a male plaintiff appropriately relegated him to the sidelines.

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misunderstanding of the case as one of sex discrimination only against men. In two of the cases, Califano v. Goldfarb, 430 U.S. 199 (1977), and Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the relevant woman, i.e., the complainant's wife, was dead. In these two cases some other woman might have been allowed to bring suit, given the Court's recognition of the harm as the deprivation of an economic benefit to wage-earning women because of their sex. *Goldfarb*, 430 U.S. at 206-07; *Wiesenfeld*, 420 U.S. at 645. Still, the Court might have used the doctrine of ripeness to bar suit by a female plaintiff.

Ironically, the traditional standing requirements defended by Lea Brilmayer, *supra* note 51, as safeguards against paternalism, operate in the sex discrimination cases to increase the effects of paternalism. The plaintiff in these cases is generally a man who then speaks for women. *See* Tushnet, *supra* note 51, at 1708-13. Disregarding counsel, cases of double-edged discrimination result in a pattern of vocal men and silent women. Whether *any* changes in standing rules can alleviate such an effect in the context of a system of law that is inherently paternalistic is another question.

85. *Cf.* Mississippi University for Women v. Hogan, 458 U.S. 718 (1982), discussed *infra* at notes 248-92 and accompanying text.

86. In time, Ginsburg turned even this distortion to advantage. *See* discussion of Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), discussed *infra* at notes 173-218 and accompanying text.

Plaintiffs in *Frontiero v. Richardson*,[87] a female Air Force lieutenant and her husband, challenged a federal statute that treated female and male members of the armed services differently. The statute allowed a serviceman to claim his wife as a "dependent," and thereby qualify for increased housing and family medical benefits, whether or not his wife was dependent upon him for support. The same statute required a servicewoman to show that her husband received more than one-half of his support from her in order to qualify for the same benefits.[88] The Court struck down the statute on an eight to one vote. Justice Brennan's plurality opinion applied strict scrutiny to gender classifiations for the first and only time.[89]

Ruth Ginsburg and the WRP played a crucial role in *Frontiero*.[90] Ginsburg's briefs represented a careful balance of bold subversion and wise restraint. They appear to form the foundation of Justice Brennan's opinion. Ginsburg played to the Court's own prejudices, in order eventually to undermine them. She supported many of her claims with citations to male authority.[91] She also appealed to the Court's masculine sense of its own power in her exposition of the only favorable Supreme Court precedent, *Reed v. Reed*.[92] But her argument emphasized the harms that the statute, and similar forms of discrimination, inflict upon women.[93]

The male plaintiff in *Frontiero* played a tangential but critical role: he provided a link for the divergent strands of Ginsburg's analysis. He suffered with his wife from the gender discrimination. More importantly, he concretely refuted the stereotyped assumption of the statute, that women are econom-

87. 411 U.S. 677 (1973).

88. *Id.* at 680.

89. *Id.* at 688.

90. Plaintiffs were represented by two men, Joseph Levin and Morris Dees, of the Southern Poverty Law Center, but at the Supreme Court, the WRP and Ginsburg took an active part, writing the jurisdictional statement, Jurisdictional Statement, Frontiero v. Richardson, 411 U.S. 677 (1973), and a seventy-page amicus brief, Brief of American Civil Liberties Union as Amicus Curiae, Frontiero v. Richardson, 411 U.S. 677 (1973), participating in oral argument, 411 U.S. at 678, and filing a joint reply brief with Dees and Levin, Joint Reply Brief of Appellants and American Civil Liberties Union, Frontiero v. Richardson, 411 U.S. 677 (1973).

91. Jurisdictional Statement at 7-8, *Frontiero*.

92. Brief of American Civil Liberties Union as Amicus Curiae at 32-33, *Frontiero*. Reed v. Reed, 404 U.S. 71 (1971), held that a statute preferring men to women as administrators of estates violates the equal protection clause of the fourteenth amendment.

93. Jurisdictional Statement at 7, *Frontiero*.

ically dependent upon their husbands, and not vice versa.[94] While Joseph Frontiero's role was peripheral, his example at the periphery highlighted the case's central issue. The structure of the litigation thus represented a small reversal of the larger social structure. Man was moved to the margins in order to focus attention on the problems faced by women.

From the outset, plaintiffs' counsel directed the courts' attention to the statute's discrimination against women. Plaintiffs' complaint identified the discrimination as burdening both Sharron and Joseph, but emphasized Sharron's harm.[95] None of the briefs, with the exception of the government's phrasing of the "question presented," argued that Joseph suffered discrimination.[96] The WRP's Jurisdictional Statement for the Court opened with a "question presented" that insisted that discrimination against women was central to the statute.[97] Ginsburg's framing of the question concentrated on both the male and female members of the armed services. The language leaves their spouses conspicuously ungendered, except in the pronominal adjective referring directly to "support."[98] Economic support was, of course, the issue. The statute's classification rested on a presumption of economic support that was

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94. Joseph Frontiero, a student, was in fact dependent on his wife for not quite half of his support. Ginsburg highlighted this in the opening paragraph of her "Statement of the Case," where she claimed that, with the exception of certain statutory allowances, "Sharron Frontiero provides the sole support for both appellants." Brief of American Civil Liberties Union as Amicus Curiae at 4, *Frontiero*.

95. Plaintiffs' complaint reads:

> PLAINTIFFS contend that the distinction drawn by the aforesaid statutes and regulations insofar as they require different treatment for male and female members of the Armed Forces, and for PLAINTIFF SHARRON FRONTIERO in particular, are arbitrary and unreasonable, in that they deny equal protection of the laws to PLAINTIFFS.

Appendix of Appellant's Complaint at 13-14, Frontiero v. Richardson, 411 U.S. 677 (1973).

96. Brief of Appellees at 1-2, Frontiero v. Richardson, 411 U.S. 677 (1973).

97. Jurisdictional Statement at 3, *Frontiero* ("Whether the classification according to sex made by [the statutes], which provide 'dependency' allowances automatically for the spouse of *male* members of the uniformed services, whether or not the spouse is in fact dependent on the member for any of her support, but which provide such allowances for the spouse of *female* members of the uniformed services only upon a showing that the spouse is in fact dependent on the member for more than one-half of his support, violates the due process clause of the Fifth Amendment to the United States Constitution." (emphasis added)). *See also* Brief for Appellants at 3-4, Frontiero v. Richardson, 411 U.S. 677 (1973); Brief of American Civil Liberties Union as Amicus Curiae at 3, *Frontiero*.

98. Jurisdictional Statement at 3, *Frontiero*.

belied by the reality of Sharron and Joseph Frontiero.[99]

The government set forth the "question presented" quite differently.[100] The government's formulation attempted to reverse the gender impact of the statute, as if Joseph Frontiero were the primary plaintiff. The government's "question presented" drew attention to the statute's impact on the man, and marginalized the woman's complaint. The district court accepted the government's representation of the statute's impact. It acknowledged that a "subtler injury" may have been "inflicted on servicewomen as a subclass," but considered any such injury a "mistaken wrong, the result of a misunderstanding."[101]

The need to convince the Court that the wrongs women suffer from such statutes were not merely "mistaken" perceptions required that Ginsburg strike a careful balance. On the one hand, Ginsburg sought to introduce women's perspective on the disabling effects of gender stereotyping to justify her claim that women should be treated as a suspect class.[102] On

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99. *Frontiero*, 411 U.S. at 678.

100. Brief of Appellees at 1-2, *Frontiero*. ("Whether statutes that provide automatic dependency benefits for the wife of a male member of the uniformed services, while providing benefits for the husband of a female member only if he is in fact dependent on her, violate the due process clause of the Fifth Amendment.").

101. Frontiero v. Laird, 341 F. Supp. 201, 209 (M.D. Ala. 1972). The district court stated:

> This Court [sic] would be remiss if it failed to notice, lurking behind the scenes, a subtler injury purportedly inflicted on service women as a subclass under these statutes. That is the indignity a woman may feel, as a consequence of being the one left out of the windfall, of having to traverse the added red tape of proving her husband's dependency, *and, most significantly, of being treated differently*. The Court [sic] is not insensitive to the seriousness of these grievances, but it is of the opinion that they are mistaken wrongs, the result of a misunderstanding.

Id. at 209 (emphasis added). The district court's language echoes the Supreme Court's approach to claims of racial discrimination in Plessy v. Ferguson, 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the forced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it."). The district court imposed burdens of proof similar to those placed on lawyers for the National Association for the Advancement of Colored People (NAACP) after *Plessy*. Ginsburg and the WRP had to prove that the wrongs women suffered from discrimination were real, and not merely the misperceptions of alleged victims. Moreover, just as the NAACP faced a predominantly white judiciary, so Ginsburg faced a predominantly male judiciary. In both instances, the litigator sought to infuse the perspectives of the dominant class with the silenced victim's viewpoint.

102. *See* Brief of American Civil Liberties Union as Amicus Curiae at 6-7, *Frontiero*.

the other hand, she had to temper such arguments with evidence that showed both the reasonableness of her perspective and the inaccuracy of the gender stereotypes.[103] These positions are potentially inconsistent. To the extent that reasonableness is defined by reference to a reasonable *man*, a woman's perspective might be dismissed as extremist. If the stereotypes Ginsburg complained of seemed to comport with men's view of women's reality, the Court was unlikely to find them unreasonable. And to the extent that the stereotypes had ceased to match reality, the Court might consider them no longer disabling.

The issue, at one level, was which standard of scrutiny to apply to claims of gender discrimination. The government urged, and the court below accepted, that gender discrimination deserved only minimal, deferential scrutiny.[104] Under that standard, if any rational basis for a gender distinction exists, the court upholds the classification. Ginsburg urged the Court to treat gender as a suspect classification, thereby triggering strict scrutiny.[105] Strict scrutiny, which is applied to racial classifications, requires a compelling state interest to justify any statutory racial distinctions.[106] As a practical matter, almost any classification can survive the deferential, rational basis standard, while commentators describe the strict scrutiny standard as "strict in form, fatal in fact."[107]

In *Reed*, the immediate relevant precedent, the Court had not decided the appropriate standard to apply to gender discrimination.[108] However, a number of commentators and lower courts had interpreted *Reed* to require something more than the traditional deferential scrutiny in cases involving gender discrimination.[109] In her brief, Ginsburg noted that the prepon-

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103. *See id.* at 8.

104. Frontiero v. Laird, 341 F.Supp. 201, 208-09 (1972).

105. Joint Reply Brief of Appellants and American Civil Liberties Union as Amicus Curiae at 6-14, *Frontiero*.

106. Regents of the University of California v. Bakke, 438 U.S. 265, 291, 305 (1978).

107. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972). *But see* Pullman-Standard v. Swint, 456 U.S. 273 (1982) (overturning the fifth circuit's conclusion that defendants intended to discriminate racially, because intent is solely an issue of fact and the reviewing court may replace only clearly erroneous findings of fact by the district court with its own findings).

108. 404 U.S. 71 (1971). The reason the *Reed* Court did not go beyond the rationality test was that the sex-based line in *Reed* failed even that minimal test.

109. Brief of American Civil Liberties Union as Amicus Curiae at 32-33, *Frontiero*; Gunther, *supra* note 106.

derance of authority interpreted *Reed* as requiring heightened scrutiny, rather than the more lenient standard. She characterized the majority view as "appraising *Reed* as a decision marking a new direction."[110] She argued against the minority view of *Reed* and characterized that view as assigning "minimal precedential value to *Reed*."[111] The Court's authority, of course, rests squarely on the "precedential value" of its decisions. In Ginsburg's presentation, then, the Court would be admitting its own weakness if it interpreted *Reed* to require only minimal scrutiny.

Ginsburg supported this appeal to the Court's collective male ego with a vast array of sources demonstrating women's inequality. She provided evidence that women were branded inferior simply by reason of their sex,[112] drew an analogy between race and sex discrimination,[113] and affirmed the difference of women's perspective.[114] Quoting Thomas Jefferson for the stereotyped view that "women should be neither seen nor heard in society's decision-making councils,"[115] she provided statistics on women's present-day political representation to reveal its continuing legacy.[116] Finally, she sharply criticized legislative and judicial pronouncements of the distant and not-so-distant past, including a strong critique of several of the Court's own decisions.[117]

Ginsburg balanced these radical-sounding claims with scattered quotes from men who had recognized women's maltreatment.[118] She also provided statistics to demonstrate that the improvement of women's situation no longer comported with traditional notions of "women's place."[119] She cited recent legislative action on the Civil Rights Act, the Equal Pay Act, and the Equal Rights Amendment,[120] and noted that a number

110. Brief of American Civil Liberties Union as Amicus Curiae at 32, *Frontiero*.
111. *Id.* at 33.
112. *Id.* at 11.
113. *Id.* at 14-15.
114. *Id.* at 15-17 (*quoting* Sojourner Truth and the Declaration of Rights from the 1848 Seneca Falls Women's Rights Convention).
115. *Id.* at 11.
116. *Id.* at 18.
117. *Id.* at 22. Some of the cases that Ginsburg criticized are listed, *supra*, in note 73.
118. *E.g.*, *id.*, at 12 n.8. ("A woman cannot be herself in a modern society. It is an exclusively male society with laws made by men, and with prosecutors and judges who assess female conduct from a male standpoint.") (quoting Henrik Ibsen).
119. *Id.* at 24-27.
120. *Id.* at 18.

of lower federal courts had invalidated gender classifications.[121] At two critical points, she used the same quotation, explicitly identifying its authors as *male* legal scholars. The quotation described the record of the judiciary in sex discrimination cases as

> . . . ranging from poor to abominable. With some notable exceptions . . . [judges] have failed to bring to sex discrimination cases those virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. . . . Judges have largely freed themselves from patterns of thought that can be stigmatized as "racist" . . . [but] 'sexism'—the making of unjustifiable assumptions about social roles solely on the basis of sex differences—is as discernible in contemporary judicial opinions as racism ever was.[122]

This quotation bridged the gap between the radical claims of a woman-centered perspective and the reasonable man's point of view. Its male authors drew a race/sex analogy, focused on stereotypes, and challenged assumptions of neutrality by criticizing past judicial performance. Ginsburg used the perspectives of these male authors to elucidate and summarize the shortcomings of *the* male perspective. She offered the Court an insight that it could not dismiss as mere women's rhetoric.

Ginsburg's strategy in *Frontiero* helped convince eight justices to invalidate the sex-based classification, though their rationales differed.[123] Stewart, Powell, Blackmun, and Burger felt that *Reed* controlled, but that no further elaboration or heightening of the minimal scrutiny standard was required.[124] Brennan, however, in a plurality opinion joined by Douglas, White, and Marshall, adopted Ginsburg's position.[125] For the first and last time, the Court used strict scrutiny as the standard for review of gender discrimination. The Court recognized the "long and unfortunate history of sex discrimination," and spoke eloquently of the harms of "benign" sex discrimination, the silencing and excluding effects of stereotyped sex roles on women, and the relevance of the sex/race analogy.[126] But the Court implicitly found these effects alone insufficient to justify striking down the statute. Using a means/end analysis, Bren-

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121. *Id.* at 28-31.
122. *Id.* at 43, *quoting* John Johnston & Charles Knapp, *Sex Discrimination By Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971); Jurisdictional Statement at 16-17, *Frontiero*.
123. *Frontiero*, 411 U.S. at 682-91.
124. *Id.* at 691-92.
125. *Id.* at 682-91.
126. *Id.* at 684-88.

nan's opinion suggested that if there had been good evidence of administrative convenience, the Court might have upheld the classification even under strict scrutiny.[127] The opinion reads like a brief with a fall-back position rather than a decision stating the law. Indeed, in subsequent cases, Brennan and the rest of the Court retreated to a more lenient standard of review.[128]

C. Kahn v. Shevin—*Paternalism and the Plight of the Poor Widow*

In the year following the *Frontiero* decision, the Court decided the first of many cases in which a solitary man sued on sex discrimination grounds. In *Kahn v. Shevin*,[129] a widower challenged a Florida statute that granted an automatic property tax exemption to widows but not to widowers.[130] The Court upheld the statute as a justifiable attempt to alleviate the unequal economic burden borne by widowed women.[131] It did so despite substantial evidence that the actual motivation for the statute was an archaic assumption about widows' dependency.[132] Women's groups, who regarded *Frontiero* as a major victory, viewed *Kahn* as a major setback.[133]

The sex of the plaintiff and the consequent nature of his claim were undoubtedly relevant factors in the Court's about-face. A man claiming sex discrimination put both parties in *Kahn* in the position of offering essentially male perspectives on women's reality. Since Mel Kahn, a widower, challenged a

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127. *Id.* at 688-91.

128. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976). For an articulate critique of the Brennan-Marshall focus on means-ends rationality, see Freedman, *supra* note 42. *But cf. infra* notes 234-47 and accompanying text, insisting on the importance of establishing a formally "neutral" test.

129. 416 U.S. 351 (1974).

130. *Id.* at 352.

131. *Id.* at 355-56.

132. The exemption was enacted in 1885, *id.* at 352, and no evidence was adduced to suggest that legislators at that time were concerned with past discrimination against women. Florida did nothing, moreover, to provide similar protection for divorced or never-married women (*see* Reply Brief for Appellants at 4, Kahn v. Shevin, 416 U.S. 351 (1974)) and the exemption was extended to all widows regardless of need. The exemption amounted to approximately $15 in tax savings annually. Herma Kay, Text, Cases and Materials on Sex-Based Discrimination 78 (2d. ed. 1981).

133. The WRP described *Kahn* as "the greatest blow women's litigation has suffered . . . since *Hoyt v. Florida* [368 U.S. 57 (1961)]." Cowan, *supra* note 10, at 391. *But see* MacKinnon, *supra* note 6, at 117 (praising *Kahn* and Schlesinger v. Ballard, 419 U.S. 498 (1975), because they inquired into the substantive harm male-dominated culture inflicts upon women, and intimated that remedies for this harm are necessary to "overturn the systematic subordination of women").

statute that favored widows on its face, the state inevitably defended the statute as preferential treatment for a disadvantaged class of women.[134] In response, plaintiff's counsel was forced to make arguments on a man's behalf about the effect on women of "benign" discrimination.[135] In *Kahn*, a man challenged a statute passed by an overwhelmingly male legislature, and both sides found themselves arguing on behalf of women.

As in *Frontiero*, Ginsburg's brief for the plaintiff included substantial compromises to the male point of view. The brief again focused on false stereotypes, but this time the effect of those stereotypes became almost genderless.[136] Where *Frontiero* was a full-scale attack on the silencing, excluding, and debilitating effects of rigidly imposed sex roles on women, *Kahn* required a concession that stereotypes also hurt men. Ginsburg was forced to invoke an abstract idea of liberty and freedom for the individual, rather than building upon a substantive notion of actual inequality.[137] A plea for women became a plea for "individuals."[138]

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134. Brief for Appellees at 22, Kahn v. Shevin, 416 U.S. 351 (1974).

135. Cowan, *supra* note 10, at 391. Ginsburg did, however, consciously choose to bring several social security cases on behalf of male plaintiffs following *Kahn*. *Id.* at 406-12.

136. The compromise, while considerable, was not complete. The brief contained a section on the specific harm done to women due to allegedly "protective" legislation, including a footnote, which in the context of a brief addressed to the brethren of the Court, bears a strikingly radical tone. Quoting Sarah Grimke, Ginsburg writes, "We ask no favors for our sex. All we ask of our brethren is that they take their feet off our necks." Brief for Appellants at 16 n.11, Kahn v. Shevin, 416 U.S. 351 (1974).

137. Special benefits for women such as the tax exemption here at issue result in discriminatory treatment of similarly situated men, themselves victims of male sex-role stereotypes. Absent firm constitutional foundation for equal treatment of men and women by the law, individuals seeking to be judged on their own merits will continue to encounter law-sanctioned obstacles.

Brief for Appellants at 4, *Kahn*; *see also id.* at 12, 15, 24.

138. This sort of argument is not wholly unpopular. *See, e.g.*, Susan Ringler, *Sex Equality: Not for Women Only*, 29 Cath. U.L. Rev. 427 (1980); Leo Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure*, 31 Hastings L.J. 1379 (1980). Kanowitz's argument, coming as it does from a male perspective, illustrates the error of a genderless version of sex discrimination:

> [A] causal glance at the treatment males have received at the hands of the law solely because they are males suggests that they have paid an awesome price for other advantages they have presumably enjoyed over females in our society. Whether one talks of the male's unique obligation of compulsory military service, his primary duty for spousal and child support, his lack of the same kinds of protective labor legislation that have traditionally been enjoyed by women, or the statutory or judicial preference in child custody disputes . . . sex discrimination against males . . . has been widespread and severe.
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> . . . [I]t is clear that males have been subjected to massive so-

Defendants answered plaintiff's somewhat abstracted claim with benevolent paternal tones of "protection for widows."[139] Citing *Reed* and *Frontiero*, defendants echoed the Court's recent lessons in the "long and unfortunate history of sex discrimination"[140] and asserted that Florida was only doing its part to ameliorate the effects of sex discrimination.[141] The brief, written by two men, shows considerable paternal "concern" for the plight of women left husbandless.[142]

All nine men on the Court accepted Florida's concern. Douglas, writing for a majority of seven, cited statistical evidence to prove that "there can be no dispute that the financial difficulties confronting the lone woman in Florida . . . exceed those facing the man."[143] Douglas retreated from his support for strict scrutiny in *Frontiero* and applied *Reed* rational basis scrutiny. He held that the "cushioning" impact of the fifteen dollar annual tax saving that Florida accorded to widows was reasonably related to the state's concern for the "disproportionately heavy burden" borne by Florida widows.[144] Brennan and Marshall, in dissent, invoked the language of strict scrutiny, but accepted at face value defendant's barely supported state purpose.[145] Their dissent turned on the statute's tailoring of means to ends.[146] It suggested that a statute more narrowly classifying widow beneficiaries would pass even strict scrutiny, without further investigation into the statute's actual purpose or imputed impact.[147] As the only woman to appear in the case,

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> cial and economic discrimination. . . . [M]en at all ages have been victims of virulent sex discrimination comparable to the kinds of discrimination that women as a group have suffered.

Id. at 1394.

Kanowitz's argument fundamentally misconstrues the asymmetrical effects of sex discrimination. His approach ignores that it is and has been men who exercise the power to impose, and, if they so desire, to change the stereotypes. Certainly the ingrained structures of tradition make this a difficult task for men, but to claim that we are therefore equal victims of discrimination is to ignore the qustion of who exercises the power to discriminate. In Kanowitz's formulation, everyone is guilty and no one is guilty. This perspective reifies evil, and mystifies power relations. Ineffectual liberal guilt reigns supreme.

139. Brief for Appellees at 23, *Kahn*.

140. *Id.* at 19 ("Women are in an inferior economic position . . . which does not appear to be correcting itself in spite of . . . legislative efforts.").

141. *Id.* at 22-25.

142. *Id.* at 24-25.

143. *Kahn*, 416 U.S. at 353-54. Justice Douglas declined to follow the *Frontiero* plurality that he had joined 11 months earlier. Frontiero v. Richardson, 411 U.S. 677 (1973); *see supra* notes 87-128 and accompanying text.

144. *Kahn*, 416 U.S. at 355.

145. *Id.* at 357-60.

146. *Id.* at 360.

147. *Id.*

Ginsburg argued forcefully that the statute burdened women more than it favored them. Nine men claimed to know better what women want.

D. Schlesinger v. Ballard—*A Man's World*

Following *Kahn*, the Court decided *Schlesinger v. Ballard*,[148] a case in which the exclusion of women's voice was nearly complete. Four men represented the plaintiff, who was a male naval officer.[149] A male solicitor general argued the government's case.[150] No other parties filed amicus briefs. In *Ballard*, plaintiff challenged a statutory provision that required mandatory discharge for male officers twice denied promotion. Female officers were discharged after thirteen years of service, male officers after only nine years.[151] Lieutenant Ballard asserted that this differential treatment arbitrarily deprived him of a benefit solely because of his sex.[152]

The briefs, argued by, on behalf of, and before men, accorded little attention to women's point of view. The government asserted the need to maintain a "balanced and effective Naval officer corps"[153] through advancement incentives. It counseled great deference to military considerations, preached judicial restraint, and emphasized the "continuing national emergency [Vietnam War] and the resultant need for a rapidly expanding and effective fighting force."[154] Almost as an afterthought, the government claimed that the differential also had a compensatory purpose.[155]

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148. 419 U.S. 498 (1975).

149. Charles Khoury, Jr., Joseph Levin, Jr., Morris Dees, Jr. and Charles Abernathy. Brief for the Appellee, Schlesinger v. Ballard, 419 U.S. 498 (1975).

150. 419 U.S. at 499. Carla Hills' name appears, along with those of five men, on the government brief. Brief for the Appellants at 20, Schlesinger v. Ballard, 419 U.S. 498 (1975).

151. *Ballard* 419 U.S. at 499-501.

152. *Id.* at 500.

153. Brief for the Appellants at 11-12, *Ballard*. Under the up-and-out policy, if an officer was not promoted (up) within a certain period of years, he or she was discharged (out). *Ballard*, 419 U.S. at 501-02.

154. Brief for the Appellants, at 9-10, *Ballard*; Reply Brief for Appellants at 1, Schlesinger v. Ballard, 419 U.S. 498 (1975). This last consideration may have carried considerable, though unacknowledged, weight in the decision. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944) (exclusion of citizens of Japanese ancestry from the west coast area of the United States held justified because of war with Japan).

155. The lack of equivalent promotional opportunity for women in the past, the relatively small number of women officers in the service, and the public interest in increasing rather than decreasing the overall number of women in the armed forces, are substantial reasons in support of the differences in question.

Plaintiff's counsel argued that the statute was arbitrary. They attempted to show that the statute's asserted purpose was not genuine, and that the means of implementing that purpose were not rational.[156] As in *Kahn*, plaintiff's brief rendered genderless the issue of sex discrimination, with only a passing footnote reference to the problem of paternalistic "protective" legislation.[157] The brief focused almost exclusively on the statute's legislative history and its operative effects.[158] The arguments were basically sound,[159] but far from compelling. Plaintiff did not argue, for example, that the statutory treatment might perpetuate and exacerbate disabling sex-role stereotypes already rampant in the military. Plaintiff did not challenge the underlying basis for the government's assertedly protective approach, the exclusion of women from combat and most sea-duty positions.[160] Finally, plaintiff's counsel argued

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Brief for the Appellants at 18-19, *Ballard*. *See* Brief for the Appellee at 24-26, *Ballard*, characterizing appellants' "compensatory purpose" justification as a new argument first raised a month after the district court trial.

156. Brief for the Appellee at 9-11, *Ballard*.

157. *Id.* at 12 n.5.

158. *Id.* at 9-20.

159. *See* 419 U.S. at 511 (Brennan, J., dissenting). Brennan adopted many of appellee's arguments to demonstrate that the purpose asserted was contradicted both by legislative history and by the irrational operational effects of the statute.

160. *See* Brennan's dissent:

> I find quite troublesome the notion that a gender-based difference in treatment can be justified by another, broader, gender-based difference in treatment imposed directly and currently by the Navy itself. While it is true that the restrictions upon women officers' opportunities for professional service are not here directly under attack, they are obviously implicated on the Court's chosen ground for decision, and the Court ought at least to consider whether they *may* be valid before sustaining a provision it conceives to be based upon them.

Id. at 511 n.1. Ballard may not have had standing to raise the restrictions issue, *see supra* note 84, which could be raised directly by a female officer. A similar difficulty underlies Rostker v. Goldberg, 453 U.S. 57 (1981), a more recent sex discrimination case brought by male plaintiffs. In *Rostker*, plaintiffs challenged the men-only registration for the draft, but left unchallenged the exclusion of women from combat positions. *Id.* at 83 (White, J., dissenting).

The National Organization for Women, as amicus curiae in *Rostker*, was forced to take an unhappy position in support of registration, because of the procedural posture presented by a male plaintiff. Interview with Anne Simon, lawyer for National Organization for Women Legal Defense Fund, New York City (March 11, 1983). Before *Rostker* arose, the ACLU had planned to bring a case on behalf of a female West Point graduate, directly challenging "combat-related" job restrictions as employment discrimination. Combat-related jobs usually carry high prestige and salary. Such a case would force the Court to confront directly the issue of women in combat-related positions, from the perspective of a woman who actively wants to assume such a position. In *Rostker*, arguments challenging the combat restriction would have been suspect, insofar

on behalf of a man who sought to "hang on" for another three years to become eligible for over $200,000 in retirement pay and benefits. If discharged immediately, Ballard would have received only $15,000 in severance pay.[161].

Thus, in what was purportedly a case about sex discrimination, the Court found itself choosing between the arguments of a government urging wartime necessity and a man seeking a windfall. Both parties either ignored the restrictions and burdens imposed on women, or used them for instrumental purposes.[162] The majority sided with the government in an opinion authored by Justice Stewart.[163] The opinion detailed the Navy's separate lines of promotion for women and men.[164] It noted that the Navy restricts women from combat and sea duty and concluded that female and male officers are "*not* similarly situated with respect to opportunities for professional service."[165] The Court found that the differential treatment was rationally based on gender differences.[166]

Justices Brennan, Marshall, Douglas and White—the *Frontiero* plurality—dissented.[167] Brennan applied strict scrutiny and determined that the statute had neither a compensatory purpose nor a compensatory effect.[168] He suggested, however, as he had in *Kahn*, that a legitimate benign purpose closely related to effective means would justify a sex classification even under strict scrutiny.[169] Women's experience continued to serve as the motivating force behind Brennan's adoption of strict scrutiny.[170] But in *Ballard*, as in *Kahn* and *Frontiero*, Brennan favored an "objective" review of legislative intent and a "logical" examination of the statute's means/ends rational-

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as they would have been made on behalf of men seeking to avoid registration altogether. The National Conference on Women and the Law in Washington, D.C. (1983) (unpublished proceedings).

161. Brief for the Appellee at 5, *Ballard*.

162. *See* Two v. United States, 471 F.2d 287 (9th Cir. 1972), *cert. denied*, 412 U.S. 931, *reh'g denied*, 414 U.S. 882 (1973) (woman challenged the same provision challenged in *Ballard* as burdening her ability to get severance pay).

163. *Ballard*, 419 U.S. at 499, 510.

164. *Id.* at 501-05.

165. *Id.* at 508.

166. Following arguments made in the government brief, Stewart also found that the need for effective leadership and the provision of incentives in the military context was greater than the administrative convenience rationales offered in *Reed* and *Frontiero*. The congressional differentiation thus deserved deference. *Id.* at 510.

167. *Id.* at 511.

168. *Id.* at 511, 518-20.

169. *Id.* at 518-19 (Brennan, J., dissenting). *See Kahn*. 416 U.S. at 358-59.

170. *Id.* at 514-19.

ity.[171] It was not enough that women suffered from the classification; the classification also had to be illogical or irrational before it could be struck down.[172] Thus, even the man who once spoke with an understanding of women's experience was ultimately confined by the boundaries of his own male perspective.

Ballard and *Kahn* illustrate the distortions and blindness that can result when women play little or no part in a sex discrimination case. Of course, the problems would not be wholly alleviated by the substitution or intervention of a female plaintiff. Without women's perspective, however, male insularity will likely go unchallenged. Men may speak of a statute's or policy's effect on women, but their argument is likely to be either paternalistic or instrumentalist.

The gender of the participants in both *Ballard* and *Kahn* reaffirmed, at the level of courtroom drama, the larger social structure of paternalism. Men dominated the speaking and acting roles, while women were pushed aside. Even if the litigants substantively challenged notions of men's centrality and women's marginality, the presentation, by and to men, could only reinforce the social scheme. Can we expect that a court composed of men, making decisions with respect to laws that men wrote, and facing a male plaintiff and male state, will be able to identify, articulate, and act from a woman-centered point of view? In *Kahn*, nine men discounted the testimony of the lone woman who appeared before them. In *Ballard*, they barely considered women's perspective. In both cases, the Court upheld legislation precisely because of its alleged compensatory effects on the absent sex.

E. The Social Security Cases—Reversing the Tide

Despite, and perhaps because of, the dangers demonstrated by *Kahn* and *Ballard*, Ginsburg and the WRP continued to bring sex discrimination cases with male plaintiffs. *Weinberger v. Wiesenfeld*[173] and *Califano v. Goldfarb*[174] were the culmination of a litigation strategy aimed at eradicating discriminatory provisions of the Social Security Act.[175] In *Wiesen-*

171. *Id.* at 518 n.9.
172. *Id.* at 511-12.
173. 420 U.S. 636 (1975).
174. 430 U.S. 199 (1977).
175. Cowan, *supra* note 10, at 406. Six cases challenged various Social Security provisions. Four featured male plaintiffs and two featured married couple plaintiffs, as in *Frontiero*.

feld, a widower sued for survivor's benefits available by statute only to *mothers* of dependent children.[176] In *Goldfarb*, the plaintiff challenged a social security statute that provided for automatic widow's benefits, but required widowers to prove dependency on their deceased wives to obtain similar benefits.[177] In both cases, the Court struck down the sex distinctions,[178] and rejected the same protective rationales that it had blindly accepted in *Kahn* and *Ballard*.[179]

The social security cases mark a significant development in the jurisprudence of sex discrimination. For the first time, the Supreme Court rejected protective justifications for statutes that treat men and women differently. The Court's newfound insight may be largely attributable to Ginsburg's use of male plaintiffs. The male plaintiffs in the social security cases differed in one critical respect from the male plaintiffs in the earlier cases: they were each attached by marriage to women wage earners who could also be portrayed as victims of the discrimination.[180] Thus, while male plaintiffs brought the cases, their marital attachments to female victims enabled Ginsburg to focus on women's interests. Instead of reinforcing notions of women's marginality, the social security cases emphasized the interrelations of gender.

The marital intermingling of financial interests allowed Ginsburg to characterize any differentiation as causing an economic harm to women.[181] Conversely, of course, it allowed the government to do the opposite. The government focused on the benefits to women and urged a protective justification for the statutes.[182] But since the statutes inflicted tangible burdens on members of both sexes, Ginsburg could undermine any protective argument with a demonstration that some members of the allegedly "protected" class were directly hurt.[183]

Ironically, the use of a married or widowed male plaintiff

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176. *Wiesenfeld*, 420 U.S. at 637-38.
177. *Goldfarb*, 430 U.S. at 201-02.
178. *Id.* at 217; *Wiesenfeld*, 420 U.S. at 653.
179. *Goldfarb*, 430 U.S. at 212-17; *Wiesenfeld*, 420 U.S. at 645, 648-53.
180. *Goldfarb*, 430 U.S. at 202-03; *Wiesenfeld*, 420 U.S. at 639.
181. Had statutes such as those challenged in *Goldfarb* provided opposite benefits, i.e., had they favored widowers and granted favorable treatment to covered women wage earners' survivors, arguably to "compensate for past economic discrimination against women wage earners," the statutes would have placed discriminatory burdens upon widows.
182. Brief for the Appellant at 11-18, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Brief for the Appellant at 15-23, Califano v. Goldfarb, 430 U.S. 199 (1977).
183. Brief for Appellee at 10-13, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Brief for Appellee at 12-18, Califano v. Goldfarb, 430 U.S 199 (1977).

in these cases also focused the Court's attention on the substantive *asymmetry* of sex classifications. Unlike arguments on behalf of an unconnected male, which tend to render the claim of sex discrimination genderless,[184] the married male plaintiff may force the Court to recognize substantive reality. Since, as the government noted in its *Goldfarb* brief, the sex of beneficiary and insured wage earner are necessarily opposite in the context of marriage, the choice of focus on one or the other, in the abstract, is "analytically indistinguishable."[185] The Court, forced to focus somewhere, may look to substance. In a benign discrimination case brought by women litigators with a male plaintiff, *both* sides will marshall evidence to show the relative inequality of women. Thus, all the substantive evidence will point towards the subordinate status of women.[186]

Ginsburg's strategy marked a compromise. In calling the Court's attention to tangible economic harms to specific women in the allegedly protected group, she narrowed the focus for judicial review of stereotypes to economic harm. But as she herself noted in her *Frontiero* brief, the burdens of sex stereotypes on women are far more subtle and widespread, and are often largely internalized.[187] An approach more radical than hers might have sought to invalidate all government decisions or classifications based on sex stereotypes demeaning to women.[188] Existing limitations on judicial intervention, however, made such broad relief unlikely. Indeed, as long as judges are predominantly male, investing them with the authority to make judgments as to what does or does not demean women, without requiring a showing of tangible economic harm, invites paternalism. Still, Ginsburg's tactic of tying stereotypical harms *only* to economic burdens may leave widespread injuries hidden from view. For example, to the extent that housework is

184. *See supra* notes 129-72 and accompanying text, discussing Kahn v. Shevin, 416 U.S. 351 (1974) and Schlesinger v. Ballard, 419 U.S. 498 (1975).

185. Brief for the Appellants at 13 n.2, *Goldfarb*. The interconnection is precisely the strength of Ginsburg's strategy. The perspectives of married women and married men are "analytically indistinguishable" only if one ignores the substantive reality of the inequality of gender. Ginsburg's hope was that the Court would not ignore that reality.

186. The danger of this approach lies in the possibility that the Court will stop at the first level of formal analysis, as five Justices arguably did in *Goldfarb*. *See infra* note 206.

187. *See* Reply Brief for the Appellants at 15-23, *Frontiero*; *see also* Barbara Kirk Cavanaugh, *"A Little Dearer Than His Horse": Legal Stereotypes and the Feminine Personality*, 6 Harv. C.R.-C.L. L. Rev. 260 (1971).

188. Recently, in Minneapolis, an ordinance defining pornography that demeans women as actionable sex discrimination was proposed, passed, and vetoed. *See* N.Y. Times, Dec. 18, 1983, § A. at 44, col. 1.

economically invisible, a legal test that focuses on economic burdens in the marketplace overlooks harm redounding to housewives.[189]

Given these countervailing considerations, Ginsburg's compromise seems to have been reasonably successful. The limited judicial focus that resulted from singling out tangible economic harms was offset at least in part by the inquiry into stereotypes that followed the demonstration of economic harm. In the social security cases, once economic harm to a member of the allegedly protected class was shown, the Court was willing to examine and articulate the broad stereotypes that seemed to underlie the classifications.[190] Such articulation has value in itself. It puts the stamp of Supreme Court disapproval on widely held beliefs about women's place. Express Court disapproval of stereotypes may cause legislatures and lower courts to disapprove of them as well. Moreover, judicial articulation of disapproved stereotypes may make it easier for plaintiffs to prove intentional sex discrimination.[191]

Wiesenfeld illustrates how a women's rights litigator can use a married male plaintiff to challenge discriminatory statutes. Stephen Wiesenfeld was a perfect male plaintiff. Like Joseph Frontiero, he defied the very stereotypes cited as the basis for the statutory scheme.[192] His wife provided most of the family's support during their three-year marriage, and, after her death, he sought to raise their child himself, despite considerable employment complications.[193] In the Wiesenfeld family, the husband and wife reversed traditional sex roles. This reversal offered concrete evidence that the sex-role stereotypes relied upon by the government to justify the statute were false.

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189. Ginsburg was aware of this dilemma. *See, e.g.*, Brief for Appellee at 27 n.26, 30 n.28, 34, *Goldfarb*. She pointed out that because "no credit is given [in calculations of dependency or statistics on contributions to family income] for the support contributed by services in the home," women's contributions were systematically underestimated, while men's were overestimated.

190. *Wiesenfeld*, 420 U.S. at 645-51; *Goldfarb*, 430 U.S. at 206, 212-17.

191. Judicial articulation of the stereotypical notions that provide the basis for gender discrimination suggests that intent in gender discrimination cases shoud not turn on animus but on evidence of stereotypical notions. Bruce Rosenblum, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeney*, 79 Colum. L. Rev. 1376, 1398 (1979).

192. With female plaintiffs this is almost a requirement, especially insofar as the feminine stereotype centers upon passivity and being "acted upon" rather than acting. Male plaintiffs, however, need not challenge the stereotype themselves in order to prevail. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976), where plaintiffs were two fraternity brothers. *See infra* notes 220-47 and accompanying text.

193. *Wiesenfeld*, 420 U.S. at 639.

Ginsburg's brief opened with a "question presented" wholly from a woman-centered perspective.[194] The question referred only to women, and directly linked both the spouse and child to the woman. Having identified the women's rights issue central to the case, Ginsburg focused the Court's attention on three victims. She argued first that the statute discriminated against Paula Wiesenfeld and other women, whose breadwinner status was devalued; second, that the statute discriminated against Stephen Wiesenfeld, whose parental status was denigrated; and third, that the statute denied Jason Paul Wiesenfeld the personal care of either parent, simply because of the sex of his deceased parent.[195] Synthesizing her claims, she characterized the discrimination as "differential treatment of identically situated *families* solely on the basis" of the gender of the deceased parent.[196] In calling attention to the family and child, Ginsburg may have played subliminally on the Court's assumptions about the relations between a mother and her family. More importantly, she personalized and desexualized the harm, only to reintroduce sexuality by characterizing the burden as turning on the gender of the covered deceased parent.[197]

The Court overturned the statute unanimously. Eight Justices explicitly disagreed with the Solicitor General's claim that "it is very difficult to fathom how an increased benefit paid exclusively to males [as a result of the Court's ruling] . . . can be an elimination of anti-female discrimination."[198] Brennan, writing for the Court, and Powell and Burger, concurring, concluded that the statute provided less protection for female

194. Whether 42 U.S.C. § 402(g), which excludes a female wage earner's surviving spouse from a Social Security benefit designed to enable the deceased wage earner's child to be cared for personally by the surviving parent, discriminates invidiously on the basis of gender in violation of the fifth amendment to the Constitution.
Brief for the Appellees at 3, *Wiesenfeld*.

195. *Id.* at 10-13.

196. *Id.* at 15 (emphasis added).

197. With facts so strong, and the immediate precedent of *Kahn* and *Ballard* so unfavorable, Ginsburg decided not to press for strict scrutiny of statutory sex classifications. She hoped to develop good case law before pushing the Court to articulate a higher standard of review. Cowan, *supra* note 10, at 398. Instead, Ginsburg insisted that the classification at issue hurt everybody (especially women), and thus did not even meet the *Reed* rational basis standard. Brief for the Appellee at 13-14, *Wiesenfeld*. In case the Court was willing to go further, however, the Center for Constitutional Rights filed an amicus brief that focused solely on the statute's impact on women, and called for strict scrutiny. Amicus Brief for Center for Constitutional Rights at 11-14, Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).

198. Brief for the Appellant at 22-23, *Wiesenfeld*.

wage earners' families than for male wage earners' families.[199] Rehnquist, concurring separately in the result, focused on the discrimination against the child and found the statute irrational.[200] Rehnquist found it unnecessary to confront the underlying issue of allegedly benign discrimination against women.[201] Brennan, however, entertained the government's "compensatory" rationale. He examined the statutory scheme and its legislative history and concluded that no compensatory purpose existed.[202] Rather, he determined that the statute was based on the impermissible presumption that "male workers' earnings are vital to the support of their families, while the earnings of female wage earners do not significantly contribute to their families' support."[203] Brennan distinguished *Kahn*, noting that the plaintiff in that case had made no showing of tangible economic harm to members of the allegedly protected class of women.[204] Ginsburg's strategy had succeeded. *Kahn* was effectively limited to situations of benign discrimination without economic harm to the "protected" class. In *Wiesenfeld*, the Court, for the first time, rejected a "compensatory" rationale.

Ginsburg's strategy was less successful in *Califano v. Goldfarb*.[205] In *Goldfarb*, a majority of the Court failed to recognize that the statutory provision discriminated against women.[206] A plurality found the discrimination "indistinguishable" from that in *Wiesenfeld*, but invalidation of the statute required the concurrence of Justice Stevens, who viewed the statute as burdening only men.[207] The basic facts of the case were familiar. A widower sought social security benefits that hinged on his deceased wife's coverage. The government denied him benefits because the statute imposed different requirements on widows and widowers. Under the statute, widows received survivor's benefits automatically. A widower

199. *Wiesenfeld*, 420 U.S. at 645.
200. *Id.* at 655 (Rehnquist, J., concurring).
201. *Id.*
202. *Id.* at 648.
203. *Id.* at 643.
204. *Id.* at 645.
205. 430 U.S. 199 (1977).
206. Ginsburg's plaintiff prevailed, and the Court struck down the challenged statute 5-4, but Stevens' swing vote, while concurring in the result reached by Brennan's plurality, agreed with the Rehnquist dissent (joined by Burger, Stewart and Blackmun) that the victims, if any, were men, not women. *Id.* at 218 (Stevens, J., concurring in the judgment); *id.* at 225-26 (Rehnquist, J., dissenting).
207. *Id.* at 204.

received benefits only upon showing that over half of his economic support came from his wife.[208] Ginsburg adopted an approach similar to the one she had employed in *Wiesenfeld*. She first emphasized the discrimination against insured working women and then focused on the marital unit.[209] She responded to the government's compensatory rationale by describing how the statute devalued the economic status of Hannah Goldfarb and other similarly situated women.[210] She outlined how the statutory scheme offered women wage earners' families less protection than that received by working men's families.[211] Finally, she noted that the presumption underlying the statute was the same overbroad "male breadwinner" stereotype that the Court had ruled impermissible in *Wiesenfeld*.[212]

Despite the case's similarity to *Wiesenfeld*, the Court's earlier unanimity splintered in *Goldfarb*. Four justices viewed the statute as impermissible discrimination against women, and four found no discrimination at all. Justice Stevens, the swing vote, concurred in striking down the statute, but on the basis of discrimination against *widowers*.[213] Stevens proposed a test that would invalidate statutes that discriminated against *men* when the statute "is merely the *accidental byproduct* of a traditional way of thinking about *females*."[214] His test proposed a lower standard of scrutiny for classifications that burden men than for those that burden women.[215] In the abstract, this seems well-intentioned. In practice, however, courts are dominated by men who find it easier to see discrimination against men, and are often blind to the burdens placed on women. Discrimination against women is often characterized as favoring or protecting women, and the Court has not been particularly adept at seeing through "benign" rationales. Stevens' test, focusing on "a traditional way of thinking about *females*," suggests that the wrong that should most concern the Court is stereotypic harm to females. Stevens' male-centered analysis of the *Goldfarb* classification, however, demonstrates the dan-

208. *Id.* at 201-03.
209. Brief for the Appellee at 6-7, *Goldfarb*.
210. *Id.* at 8, 34-38.
211. *Id.* at 7.
212. *Id.* at 24. The government, again represented by Solicitor General Robert Bork, also offered repeat arguments. As in *Wiesenfeld*, the government focused attention on the beneficiaries rather than the insured individuals, while asserting in a curious footnote that the distinction "is one of merely rhetorical significance." Brief for the Appellants at 13 n.2, *Goldfarb*.
213. *Goldfarb*, 430 U.S. at 224.
214. *Id.* at 223 (emphasis added).
215. *Id.* at 218-19.

ger of relying on such judicial concern; Stevens was unable to see that the classification burdened women. The "accidental byproduct" test sets a low burden of proof for the government. To justify disparate treatment, the government need only show that "something more than accident" underlies a classification.[216] Thus, Stevens' approach unwittingly demonstrates the difficulties inherent in relying on men to see through women's eyes. Stevens saw enough to know there is a difference between discrimination against women and men, but not enough to know the difference when he sees it.[217]

The plurality and the four-vote dissent in *Goldfarb* wholly adopted the arguments of the briefs they favored, and added nothing to the jurisprudence of sex discrimination. Women's groups viewed the *results* in *Goldfarb* favorably, but the Court's doctrinal and perceptual confusion demonstrated that there is no failsafe way for women to inform men about their perspective. Ginsburg's strategy for attacking the legacy of benign discrimination had to rely ultimately on men's ability to see discrimination from a women's perspective. In *Goldfarb*, five men failed her.[218]

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216. *Id.* at 223.

217. In writing this, I know that I am susceptible to the criticism that to some extent, I share Stevens' shortcomings. If that is the case—and at some level it almost necessarily will be so—I welcome comments and criticism.

From a woman-centered perspective, Rehnquist's dissent in *Goldfarb* concludes with an unfavorable result, but his dissent is in some ways less insidious than Stevens' concurrence. Where Stevens presumed to speak with an enlightened voice, Rehnquist simply parroted the government's arguments. Rehnquist counseled deference to social insurance legislation and defined the effect of the statute narrowly—"to make it easier for widows to obtain benefits than widowers." 430 U.S. at 225 (Rehnquist, J., dissenting). He distinguished *Wiesenfeld* on the facts and found *Frontiero* irrelevant on the grounds that compensation for services differs from social insurance. *Id.* at 240-41. These are old arguments, all soundly rejected in *Wiesenfeld*, 420 U.S. at 646-53, and by the majority in *Goldfarb*, 430 U.S. at 204 n.4. The only thing that is surprising about Rehnquist's dissent is that three Justices (Burger, Stewart, and Blackmun) joined it. *Id.* at 224.

218. Soon after *Goldfarb*, the Court decided Califano v. Webster, 430 U.S. 313 (1977), upholding per curiam a Social Security statute that provided differential treatment for women and men in computation of old-age insurance benefits. The statute, challenged by a man, weighted women's high wage years more favorably than men's. This yielded higher old-age benefits for retired women who had earned the same salary as men. *Id.* at 316. The Court justified this compensatory scheme by examining legislative history that evidenced deliberate, rather than accidental, compensation for women's economic disabilities. *Id.* at 320. The Court also noted that the classification did not "in fact penalize women wage earners." *Id.* at 317.

The *Goldfarb* dissenters concurred in the *Webster* judgment, but wrote separately to reaffirm their *Goldfarb* analysis. *Id.* at 321. Thus, the per curiam opinion is a compromise between the Stevens and the Brennan plurality, evi-

F. Craig v. Boren—*Avoiding Paternalism*

It has long been considered ironic that the Court's first articulation of the "intermediate" standard for review of gender classifications came in *Craig v. Boren*, a case concerning men's rights to buy "near-beer."[219] The plaintiffs in *Boren* were two fraternity brothers and the proprietor of a bar called "The Honk and Holler."[220] They successfully challenged an Oklahoma state law that barred eighteen to twenty-one year old men, but not women, from purchasing 3.2 percent beer.[221] Examination of the parties' briefs highlights the irony that the *Boren* case established heightened scrutiny of sex classifications. The Oklahoma attorney general offered an essay on the state's twenty-first amendment right to regulate liquor sales.[222] Plaintiffs' counsel, a man, wrote a confusing, overstated, plainly sexist, self-proclaimed "Bicentennial Brief."[223]

The deepest irony may be that *only* in such a case could the Court articulate a heightened standard of review for sex discrimination cases. *Boren* was the first Supreme Court case in which the government justified discrimination against men with a rationale other than administrative convenience or be-

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dent here in the use of the "accidental byproduct" test. *Id.* at 320. Briefs were not available for this case, but it seems that Ginsburg and the WRP were not involved. Ginsburg has written approvingly of the Court's decision. She too found the legislative purpose to be based on affirmative action grounds, rather than on stereotypical notions. *See* Ruth Ginsburg, *Some Thoughts on Benign Classification in the Context of Sex*, 10 Conn. L. Rev. 813 (1978). Other feminist commentators are more critical of the Court's decision. *See* Gertner, *supra* note 6; Williams, *supra* note 67, at 179 n.35.

219. 429 U.S. 190 (1976).

220. Brief of Appellant at 1, Craig v. Boren, 429 U.S. 190 (1976).

221. *Boren*, 429 U.S. at 191-92, 210.

222. Brief of Appellees at 4-8, Craig v. Boren, 429 U.S. 190 (1976).

223. Brief of Appellant at 52, *Boren*. The government asserted that drinking was not a constitutionally-guaranteed right, counseled great deference to state regulation of "intoxicants," and quoted at length from the much criticized Goesaert v. Cleary, 335 U.S. 464 (1948). *See* Brief of Appellees at 9-13, *Boren*; *cf.* 429 U.S. at 210 n.23. Plaintiffs' brief was even worse. Its hyperbolic style—marked by needless italics, exclamation points, and capitalization—trivialized the matter by its very insistency. *See, e.g.*, Brief for the Appellants at 47, *Boren* (comparing the age limitation for purchasing 3.2% beer to the "badge of inferiority" of school segregation).

Both sides, moreover, lost themselves in a hopeless morass of largely irrelevant statistical studies. *See* Brief for the Appellant at 20-43, *Boren*; Brief for the Appellees at 18-32, *Boren*, Appendix at A-21-A-31, *Boren*; Brief for American Civil Liberties Union as Amicus Curiae at 25-34, Craig v. Boren, 429 U.S. 190 (1976). For the Court's treatment of the statistics, see 429 U.S. at 200-04: "There is no reason to belabor this line of analysis. It is unrealistic to expect either members of the judiciary or state officials to be well versed in the rigors of experimental or statistical technique." *Id.* at 204.

nign protectionism. The Court found Oklahoma's purported interest in traffic safety serious enough to warrant greater consideration than administrative convenience, but evidently less problematic than paternal protectionism. For the first time, the Court confronted discrimination that it could easily see—discrimination against men—without the confusing baggage of benign rationales. And for the first time, a majority of the Court articulated a new, heightened standard of scrutiny for sex classifications. Under this new "intermediate" standard, the Court required that sex-based classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives."[224]

The Court received little guidance from plaintiffs' counsel. Sexism and confusion pervaded plaintiffs' briefs. Opening the Jurisdictional Statement, counsel framed the "question presented" as follows: "[W]hether [the statutes], permitting *girls* to buy 3.2% beer at age 18 while capriciously prohibiting *men* therefrom until age 21, is unconstitutional."[225] Later, he distinguished *Geduldig v. Aiello*,[226] *Kahn*, and *Ballard*, in ways that implicitly justified their results.[227] And in two footnotes, he displayed an uncanny blindness to his own sexism. Near the end of his Reply Brief, he noted the irrationality inherent in laws that allowed an eighteen year old to serve in the armed services, but prohibited his purchase of 3.2 beer.[228] He claimed that to trust an eighteen year old's "combat-*disqualified* girlfriend" with beer, but not to trust him, was "nothing less than

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224. *Boren*, 429 U.S. at 197.

225. Jurisdictional Statement at 5, Craig v. Boren, 429 U.S. 190 (1976) (emphasis added).

226. 417 U.S. 484 (1974) (pregnancy discrimination case where the Court applied a rational basis standard).

227. Jurisdictional Statement at 12, *Boren*.

228. Reply Brief for the Appellant at 13, Craig v. Boren, 429 U.S. 190 (1976) (emphasis added). An internal reference directs the Court's attention back to the following footnote, in case they missed it the first time:

> This very fact has led to some satirical comment that the discrimination in question derives its continued vitality not so much from a Fundamentalist as from a *matriarchist* conspiracy: comprised of middle-aged mothers with an over abundance [sic] of comely daughters of the nubile ages who would have but scanty prospects for "dates" without the discrimination in question, but whose prospects therefor are being materially enhanced by their legal monopoly amongst 18-21 year olds for the purchase of beer, and because of which statutorily-invested monopoly the thirsty young men of the same age group have no choice but to invite said comely girls out, so that they (the girls) can *inter alia* purchase the very beer which will in turn further materially enhance their mating prospects.

Brief for the Appellants at 46 n.15, *Boren*.

insult."[229] In case the nature of the insult was unclear, he added a descriptive footnote:

> One can well imagine, under the present law, the spectacle outside the PX package store at Fort Sill, Oklahoma, of a 20-year-old First Lieutenant of artillery—maybe even a battery commander, with all the power and responsibility that that entails—idling his jeep while his 18-year-old WAC clerk-typist PFC runs in to purchase her CO's six-pack for him![230]

The amicus brief of Ginsburg and the WRP provided the solitary voice of reason in the case. As the statute placed no tangible economic burden on women, Ginsburg was forced to address the effect of the statute's underlying stereotypes. She noted that while "on its face" the statute discriminated against men,

> upon deeper inspection, however, the discrimination is revealed as simply another manifestation of traditional attitudes and prejudices about the expected behavior and roles of the two sexes in our society, part of the myriad signals and messages that daily underscore the notion of men as society's active members, women as men's quiescent companions, members of the "other" or second sex.[231]

While Ginsburg admitted that such "gender pigeonholing" hurts both men and women, she insisted that the ultimate burden falls on women.[232] She also reminded the Court that men had written the law.[233]

She directed the Court's attention to the limiting effects of stereotypes per se, infused with an understanding of the substantive inequality that underlies them. She asserted that even documented assumptions are inadequate when they involve stereotypic "notions about the way women or men are."[234] In support of this proposition, she cited *Reed*, *Frontiero*, and *Wiesenfeld*, whose defendants had offered better documentation for their stereotypic assumptions than Oklahoma presented here.[235] Ginsburg's argument in *Boren* thus extended beyond the *Wiesenfeld* and *Goldfarb* focus on tangible economic burdens. Still wary of the Court's perspective, Ginsburg couched her stereotype argument in formally neutral terms. At the

229. Reply Brief for the Appellants at 13, *Boren*.
230. *Id.* at 13 n.6.
231. Brief for the American Civil Liberties Union as Amicus Curiae at 22, *Boren*.
232. *Id.* at 21-23.
233. *Id.*
234. *Id.* at 15.
235. *Id.* at 14.

same time, she based her argument on the substantive reality of women's subordinate status. She suggested a facially neutral inquiry focused on gender pigeonholing but insisted that it be grounded on a substantive understanding that the ultimate harm of all statutory sex distinctions falls upon women.[236] Ginsburg's approach thus attempted to minimize the danger of both Stevens' partially perceptive vision[237] and the paternalistic predilections of most men.

Brennan's majority opinion substantially incorporated Ginsburg's suggestions. He established an "inaccurate proxy" inquiry. This inquiry asks whether a statute's gender classification actually acts as a "proxy" or substitute for some other social classification.[238] Brennan's test requires a functional examination of the gender classification. The framing of the inquiry in functional terms almost dictates its conclusion. Once an underlying functional purpose is discovered, gender usually proves to be an inaccurate dividing line.[239] Moreover, the functional characteristic itself will often provide a preferable gender-neutral classification.[240] Brennan recharacterized much of the case law in terms of this new test, concluding that

> In light of the weak congruence between gender and the characteristic or trait that gender purported to represent, it was necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion, or to

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236. *Id.* at 21-23.

237. *See supra* notes 213-17 and accompanying text.

238. *Boren*, 429 U.S. 188-89.

239. *Id.*

240. In *Boren*, the state asserted that gender was being used as a "proxy for drinking and driving," 429 U.S. at 201-02. The state sought to decrease the amount of drunk driving by forbidding males aged 18-21 from purchasing 3.2% beer. At trial, the state introduced statistics to demonstrate that men drink and drive more than women. Brennan focused on the "fit" between maleness and drunk driving, and found that only two percent of males in the 18-21 year old age group were arrested for drunk driving. *Id.* at 201. The statute therefore inappropriately punished 98% of all young men. Thus, gender was an inaccurate place to draw the line. Brennan called this inaccuracy "an unduly tenuous 'fit.'" *Id.* at 202. Brennan went on, however, to note that even where the statistical correlation between gender and the functional characteristic was much closer, the Court had struck down gender distinctions where the purpose could be furthered by a gender-neutral distinction. *Id.* at 202 n.13 (discussing *Reed*, *Frontiero*, and *Weisenfeld*). The inaccurate proxy test suggests that where the use of gender as a proxy *is* accurate, the sex-based classification will be upheld. The structure of the inquiry, however, makes that result unlikely. Once the statute's functional purpose is revealed, that purpose can often be addressed in gender-neutral fashion, and plaintiffs of either sex can usually offer sufficient counter-examples to undermine the accuracy of the proxy. Moreover, Brennan suggests that even where accurate, the *perception* of invidious discrimination caused by using gender as a proxy may require that a statute be overturned. *Id.* at 208.

> adopt procedures for identifying those instances where the sex-centered generalization actually comported to fact.[241]

The proxy inquiry is facially neutral. As *Boren* suggests, the inquiry applies to discrimination against both women and men, and thereby avoids some of the problems of perspective that Justice Stevens' approach manifested. Moreover, the accuracy of the proxy does not turn on whether women are "similarly situated" to men. Rather, Brennan's analysis turns on whether the statute's gender proxy is germane to the purpose of classification, or, in other words, whether a functional definition of the class of people affected would serve the purpose as effectively as gender.[242]

Thus, in *Boren*, Ginsburg entered a poorly argued dispute about a trivial matter, and achieved a substantial victory for women. Her involvement avoided a muting of the women's rights issue in the case. Absent Ginsburg's input, the decision might well have provided an obscure treatise on the twenty-first amendment, or at most a Stevens-type opinion about discrimination against men.[243] Perhaps because of the apparently marginal nature of the issue, Ginsburg was able to inject the traditionally "marginal" women's viewpoint. She convinced at

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241. *Id.* at 199. Each of the examples cited by Brennan described inaccurate assumptions about women, suggesting that Brennan understood where the ultimate harm falls.

242. Women must still, of course, present themselves as similarly situated to show a statute's relative burdens or benefits, but after the initial showing they need not prove that they are "the same as" men. They must show only that men's notions about "what women are" are inaccurate. *But cf.* Michael M. v. Superior Ct. of Sonoma County, 450 U.S. 464, 469-71 (1981) (Rehnquist, J.), and Parham v. Hughes, 441 U.S. 347, 353-57 (1979) (Stewart, J.), both of which articulate a test that turns on whether women and men are similarly situated, or alternatively, on whether the Court considers the classification demeaning to "the affected class." In both *Michael M.* and *Parham*, the Court denied equal protection claims because it found women and men *not* similarly situated with respect to the challenged statutes. 450 U.S. at 476, 441 U.S. at 360.

This Rehnquist-Stewart test combines the problems of Stevens' approach, *see supra* notes 213-17 and accompanying text, and the more general problems of requiring assimilation into male culture. *See supra* notes 8, 38-57 and accompanying text. Insofar as the Court, under the Rehnquist-Stewart test, relies in each case on its own judgment about which class is "affected," and whether that class is "demeaned" by a particular law, the dangers of paternalism will always be present.

Brennan's test avoids the worst of both dangers. It ameliorates the assimilationist requirement of "similarly situated" inquiries. By presuming the underlying substantive inequality of women and applying a formal, sex-neutral inquiry informed by that presumption, it recognizes women's perspective and condition as an imperative reason for strong *sex-neutral* inquiry. Thus, Brennan has recognized, and to the extent possible, guarded against, his own paternalism. For a somewhat different perspective, see Freedman, *supra* note 42.

243. *See supra* notes 213-17 and accompanying text.

least some members of the Court that discrimination against men *not* explicitly justified by paternalistic reasoning harms women, at least as long as men write the laws.[244]

Brennan's new approach—heightened scrutiny with a particular focus on the use of gender as a proxy for a functional classification—marked a substantial development in sex discrimination jurisprudence. While far from ideal,[245] it represented a subtle compromise. The inquiry is formally neutral but informed and/or motivated by an underlying recognition of women's substantive inequality. The paternalistic predilections of a male judiciary demand formal neutrality. Women's reality demands the substantive recognition of women's inequality. Brennan's "inaccurate proxy" test attempts to reconcile these ultimately irreconcilable requirements.

Boren's male plaintiffs[246] and their near-trivial complaints served Ginsburg well. If, for example, the stereotype-proxy inquiry had been developed in a case brought by a female plaintiff, the Court might have felt no need to neutralize the formal inquiry. And if defendants had been able to claim compensatory treatment of women, as had so many defendants before, the Court might have been reluctant to frame such a broad stereotype inquiry absent specific, tangible harms to women allegedly protected by the statute.[247] The fact that a male plain-

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244. *See Boren*, 429 U.S. at 198-99, where Brennan discusses the history of sex-role stereotyping in the law almost exclusively in terms of its effect on women.

245. It does not, for example, take into account the problem of stereotypes that *are* true, for whatever reason. *See* MacKinnon, *supra* note 6.

246. Technically, the plaintiff at the Supreme Court level was the female bar owner, since both male plaintiffs were by then over 21. She was granted standing to assert *their* rights on an economic rationale—she would lose male customers if the statute was upheld. *Boren*, 429 U.S. at 192-93.

247. In Orr v. Orr, 440 U.S. 268 (1979), Brennan applied the *Boren* intermediate scrutiny standard and the gender proxy test to an Alabama statute that authorized state courts to impose alimony obligations on husbands but not on wives. There, the state did advance a compensatory rationale, but Brennan found that the gender proxy was inadequate no matter how reliable. Individualized hearings were already required by the statute. In these hearings, the state could also determine whether in fact the husband or wife was dependent or needy. *Id.* at 281. In addition, Brennan noted the potential paternalistic dangers in "benign" discrimination, stating that "even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored . . . [for they] carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Id.* at 283. Thus, using the analysis developed in *Boren*, the Court struck down allegedly benign discrimination *without* a showing of tangible economic harm to women, on the explicit presumption that protective rationales harm women in broader, but no less real, ways. Without *Boren*, the statute at issue in *Orr* might have survived. In *Orr*, the Court focused on the operation of the statute's gender classification and its underlying assumptions, not on the reasona-

tiff was complaining about discrimination against men helped to create a potential safeguard against the Court's paternalistic misperceptions. Ginsburg's input ensured that the formal neutrality rested on the reality of women's substantive experience. The Brennan test recognized women's perspective, but also implicitly recognized that the dangers of paternalism required a male-dominated Court to maintain a formal "neutrality" in its inquiry. Thus, Brennan accepted women's perspective and questioned his own, effectively granting women a presumption that the ultimate harm of male-imposed differentiation falls on them.

G. Mississippi University for Women v. Hogan—*A Woman Speaks*

Justice O'Connor wrote the majority opinion in *Mississippi University for Women v. Hogan*,[248] marking the first time that a woman has spoken from the Supreme Court on the issue of sex discrimination.[249] In *Hogan*, the Court addressed the question of sex-segregated education. Joseph Hogan challenged a policy of the Mississippi University for Woman that denied men admission to the University's School of Nursing.[250] In an opinion carefully and explicitly limited to the facts and circumstances of the case, the Court found this exclusion unconstitutional.[251]

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bleness of the protective rationale (which the Court accepted as a legitimate government interest). Thus, *Boren*, as applied in *Orr*, offers a stronger mode of analysis for benign discrimination rationales than the Social Security cases' focus on tangible economic harms. *See also* Califano v. Westcott, 443 U.S. 76, 89 (1979), where the Court invalidated a provision in the Aid to Families With Dependent Children program which provided benefits to a family when the father was unemployed, but not when the mother was unemployed. Justice Blackmun, writing for the majority, concluded that the gender classification was based on the sexual stereotype that the male is always the breadwinner, and was also not substantially related to any valid statutory goals.

248. 458 U.S. 718 (1982).

249. Ginsburg's considerable impact, detailed above, had to be filtered not only through numerous male plaintiffs, but also through nine male Justices. Whether the addition of a solitary woman to the Court will ultimately make a significant difference in sex discrimination law can and should be doubted. The least of the reasons for such doubt is Justice O'Connor's political position. More important, certainly, is the legacy of centuries of man-made law and language, institutionalized in the Court's procedures, carried forward with the weight of precedent, and internalized in us all, men and women alike. In addition, O'Connor is still obviously outnumbered, and can only speak for the Court when at least four men allow her to do so. Finally, there is the possibility that the ideal of neutrality and men's suspicion will drive O'Connor to be especially tough and "objective" on issues affecting women. Nevertheless, some hope can be gained from the following reading of O'Connor's opinion in *Hogan*.

250. *Hogan*, 458 U.S. at 720-21.

251. *Id.* at 727-33.

The Court left largely undecided the question of sex-segregated education per se.[252]

Unlike the cases discussed above, the Court in *Hogan* heard a wide representation of women's interests. The ACLU was of counsel from the suit's inception,[253] and two politically distinct groups of women filed amicus briefs. Several women's rights groups argued in a joint amicus brief that the exclusion was unconstitutional in the context of *this* nursing school.[254] The Mississippi University for Women Alumnae Association voiced a quite different women's viewpoint, calling on the Court to recognize women's right to education in a single-sex environment.[255]

Resolving the question of sex-segregated education requires recognition of the asymmetry of gender classifications. A woman-centered perspective sees many legitimate reasons for women-only institutions, but little justification for men-only institutions. Women have been excluded from and silenced in all social spheres: a women-only education may allow them to develop relatively free of the imposition of such disabling silence. A women's university can offer women same-sex role models, still rare at many coeducational colleges. Moreover, the woman-centered university can recognize and affirm women's positive difference in a way that man-centered (i.e., coeducational and men-only) institutions cannot.[256] Men-only education, on the other hand, can claim none of these justifications. Men have not been excluded or silenced, male role models are virtually omnipresent, and men's positive difference from women has been celebrated for centuries.

Thus, resolution of the sex-segregated education question requires recognition of women's substantive differences. Such recognition, however, from the male perspective, has always been paternalistic. A male perspective of women's difference threatens to perpetuate subordinating stereotypes. The tradi-

252. *Id.* at 733.

253. By this time, Ginsburg had left to take a judgeship on the United States Court of Appeals for the D.C. Circuit. Ginsburg was appointed on June 18, 1980.

254. Amici Brief of National Women's Law Center, National Organization for Women Legal Defense and Education Fund, Women's Equity Action League, and Women's Legal Defense Fund, Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) [hereinafter cited as Amici Brief of Women's Rights Groups].

255. Amicus Brief for Mississippi University for Women Alumnae Association, Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

256. *See* Adrienne Rich, *Toward a Woman-Centered University* in On Lies, Secrets, and Silence 125-55 (1979). For discussion of women's perspectives of difference, see *supra* notes 13-37 and accompanying text.

tional and purportedly "neutral" approach, however, disregards substantive gender inequalities, and would logically support both men-only and women-only institutions (or neither). This "neutral" approach also perpetuates the male perception of difference, and would allow the continuation of a practice central to women's exclusion from all areas of the public sphere.[257] Women who support women-only education but challenge men-only institutions face a no-win situation when addressing a male court.

Hogan's counsel explicitly denied that they were challenging the constitutionality of all sex-segregated education.[258] Their arguments, nevertheless, attacked the Mississippi University for Women as a whole, putting the Court in a position to answer broadly the question of sex-segregated education.[259] The court of appeals, for example, held the exclusion unconstitutional on dangerously broad grounds. First, the court asserted that "to justify gender-based discrimination in this case, Mississippi cannot advance a reason that is based on gender."[260] Second, it reasoned that the existence of a corollary men-only school might remedy the problem.[261] Such reasoning is based on an assumption of pre-existing substantive equality between the sexes. It fails to account for the asymmetry and inequality of men's and women's situations. Applied broadly, the court's reasoning would render all women-only institutions constitutionally suspect.

Counsel for the University—a man—also broadly construed the issue to be the constitutionality of sex-segregated education per se. Defendant's brief asserted the by-now-familiar compensatory argument, citing Supreme Court precedent upholding protective labor laws for women.[262] It offered exten-

257. *See, e.g.*, the Supreme Court-approved approach taken in Vorchheimer v. School Dist. of Philadelphia, 532 F.2d 880 (3d Cir. 1975), *aff'd*, 430 U.S. 703 (1977) (court upheld Philadelphia's offering of an all-male high school and an all-female high school, despite evidence that the boys' school had science offerings superior to those at the girls' school); Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970), *aff'd*, 401 U.S. 951 (1971) (court upheld state statute establishing a women's-only college, which was set up as a liberal arts college with special attention given to instruction in teaching, bookkeeping, typing, sewing, cooking, and stenography).

258. Brief for Respondent at 8, Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).

259. *Id.* at 5-8, 11-26.

260. Hogan v. Mississippi University for Women, 646 F.2d 1116, 1119 (5th Cir. 1981).

261. *Id.* at 1118-19.

262. Brief for Petitioner at 11-19, Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). *See* Muller v. Oregon, 208 U.S. 412 (1908).

sive generalized support for women-only universities.[263]

Plaintiff's counsel narrowed the issue somewhat by focusing exclusively on the Mississippi University for Women. They questioned the sincerity and effectiveness of the state's asserted protective purpose by referring to the University's enabling charter, which reflected an archaic notion of women's place.[264] Plaintiff's brief set Mississippi's alleged "compensatory" purpose within the context of a history of state laws that reflected stereotypical notions about women.[265] It noted the current University's male-dominated administration and senior faculty, its gender-stereotyped curriculum, and its policy of allowing men to audit classes.[266] Doctrinally, plaintiff offered the Brennan rationale for heightened scrutiny even where men are the nominal complainants.[267] Plaintiff's brief reflected a substantive understanding that women's interests were at stake. Unfortunately, the breadth of the attack overlooked the dangers of the Court's male perspective.

The amici curiae, all of which were women's groups, presented two divergent female perspectives. The University's alumnae association, represented by the same man who represented the University, presented one perspective. The association supported the exclusion of men based on two notions of women's difference:

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263. Brief for Petitioner at 12-19, *Hogan*.

264. [T]he establishment and maintenance of a first-class Industrial Institute and College for the education of white girls on the State of Mississippi, in the arts and sciences, at which such girls may acquire a thorough normal school education, together with a knowledge of kindergarten instruction, also a knowledge of telegraphy, stenography and photography; also a knowledge of drawing, painting, designing, and engraving in their industrial application; also a knowledge of fancy, practical and general needlework; and also, a knowledge of bookkeeping, with such other practical industries as, from time to time, to them may be suggested by experience; or tend to promote the general object of said Institute and College, to-wit: fitting and preparing such girls for the practical industries of the age.

Brief for Respondent at 12-13, *Hogan*.

265. *Id*. at 15-17.

266. *Id*. at 18-21.

267. That MUW's policy on its face disfavors men and not women makes no difference. Many statutes which purport to favor women are based on and perpetuate the kinds of 'old notions' and 'archaic and overbroad generalizations' about women which this Court has repeatedly condemned. Further, all gender-based discriminations 'carry the inherent risk of reinforcing stereotypes about the "proper place" of women and their needs for special protection.' Accordingly, these principles apply whether the classification under review nominally favors men or women.

Id. at 9.

> (1) "women are 'biologically' and psychologically different from men and thus require somewhat different approaches to such experiences as education," and
>
> (2) "in the aspect of life known as courtship or mate-pairing, the American female remains in the role of the pursued sex expected to adorn and groom herself to attract the male."[268]

Both statements reflect a man's point of view; although the first notion might be interpreted as either feminist or paternalistic, the second resolves all doubts. The association asked that women-only education be upheld as a reasonable accommodation of such sex differences.[269]

The women's rights groups that jointly filed an amicus brief for the opposite side presented another perspective. They expressed concern for the paternalism inherent in the recognition of differences as characterized by the alumae association.[270] They narrowed the focus considerably, and concentrated the Court's attention exclusively on the School of Nursing.[271] With this approach, the issue became not the provision of education for women only, but the provision of sex-segregated nursing training. In this light, Brennan's inquiry into stereotypes takes on greater relevance, because nursing has long been labeled a "woman's profession."[272] The women's rights groups argued that where the state offers a compensatory rationale for a classification that reinforces sex-role stereotypes, the Court must examine the rationale especially closely.[273]

Justice O'Connor's majority opinion, joined by Brennan, Marshall, White, and Stevens, adopted the narrow focus urged by the women's rights groups,[274] and held Hogan's exclusion on the basis of sex unconstitutional.[275] O'Connor reaffirmed the heightened scrutiny standard introduced in *Boren* and insisted that it must apply equally to discrimination against males and females.[276] She strongly rejected the dissenters' attempt to apply a watered-down version of the *Boren* test where they ap-

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268. Brief of Mississippi University for Women Alumnae Assoc. as Amicus Curiae at 2-3, *Hogan*.
269. *Id.* at 2-4.
270. Amici Brief of Women's Rights Groups, *supra* note 254, at 26-33.
271. *Id.* at 8.
272. *Id.* at 9, 20-21.
273. *Id.*
274. *Hogan*, 458 U.S. at 722 n.7.
275. *Id.* at 733.
276. *Id.* at 723-27.

prove of the state's objective.[277] This rejection suggested a recognition of the necessity, given a male-dominated Court, of establishing and maintaining a formally "neutral" test, informed by an understanding of women's condition.

O'Connor's restatement of the *Boren* analysis demonstrated a sensitivity to the paradox of men deciding women's rights. At the outset, she warned of the limitations of an unquestioning male perspective: "Although the test . . . is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females."[278] O'Connor's opinion delineated two levels of inquiry. At the first level, O'Connor examined the statutory objective and emphasized the dangers of "benign" discrimination: "[I]f the statutory objective is to exclude or 'protect' members of one gender because they are presumed to suffer from an inherent handicap or to be innately inferior, the objective itself is illegitimate."[279] In a footnote, O'Connor implicitly criticized earlier Supreme Court decisions that had upheld protective labor laws applied to women, thereby alerting the Court to its own past paternalism.[280]

At the second level of inquiry—whether there was a "direct, substantial relationship between objective and means"[281]—O'Connor again warned of the Court's male perspective. The purpose of the second level, she explained, was to guard against the "mechanical application of traditional, *often* inaccurate, assumptions about the proper roles of men and women."[282] O'Connor's addition of "often" suggests an understanding that the harm that results from stereotype-motivated reasoning does not necessarily turn on inaccuracy, but may inhere in sex-role stereotyping per se, accurate or inaccurate. Having thereby implied a broader notion of stereotypes than the Court had previously proclaimed, O'Connor concluded by invoking the proxy analysis of *Boren*.[283] Throughout, O'Connor phrased her restatement of Brennan's test in gender-neutral terms. Her warnings to her male peers, however, suggested an implicit recognition of the substantive inequality of

277. *Id.* at 724 n.9.
278. *Id.* at 724-25.
279. *Id.*
280. *Id.* at 725 n.10.
281. *Id.* at 725.
282. *Id.* at 726 (emphasis added).
283. *Id.*

women.[284]

The Court found that the state had failed to show that its allegedly compensatory purpose was genuine, or that the means used substantially furthered the alleged purpose.[285] O'Connor emphasized that the state bears the burden of showing *actual* compensatory intent.[286] In *Hogan*, there was strong evidence to the contrary, including the University's charter, which the Court cited in full in its first footnote.[287] O'Connor noted that since women already dominate the field of nursing, the state's purpose in segregating the nursing school could not have been compensatory.[288] She speculated that the policy may in fact harm women, because it perpetuates the stereotype and reality of nursing as a woman's job, thereby indirectly depressing nurses' wages.[289] Finally, she found that the testimony that the University's practice of admitting male auditors had no affect on women's performance "fatally undermine[d]" their claim that female students required protection from the presence of men.[290]

O'Connor's opinion in *Hogan* furthered the cause of women's rights, while carefully guarding against paternal excess. By striking down the statute on the narrowest possible grounds and thereby bringing to light the statute's underlying stereotypes, O'Connor's opinion manifested an understanding of the importance of challenging unquestioned perspectives of difference. At the same time, by limiting the holding to nursing schools,[291] she restrained the Court from broadly imposing assimilationist notions of sameness.[292]

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284. O'Connor's opinion does not itself rest explicitly on the history of society's subordination of women, and it may be that her reading represents a conception that since men and women are substantially equal already, the laws should treat them equally. O'Connor's restatement, however, incorporates Brennan's test wholly, and his test does rest upon a recognition of women's subordinate status. *See supra* notes 240-44 and accompanying text. Moreover, O'Connor's criticisms of judicial precedent and her warnings about paternalism suggest at least an implicit understanding of where most of the blame lies.

285. *Id.* at 727.

286. *Id.* at 730, 730 n.16.

287. *Id.* at 720 n.1.

288. *Id.* at 729.

289. *Id.* at 729-30 n.15.

290. *Id.* at 730.

291. *Id.* at 719, 733.

292. Some members of the Court are, not surprisingly, blind to O'Connor's apparent sensitivity. As noted in the introduction to this article, both Blackmun and Powell wrote stinging dissents warning of "needless conformity." *Id.* at 733-35 (Blackmun, J., dissenting); 735-39 (Powell, J., dissenting). Both dissents misread the holding as broader than it is, and then go on to praise the virtues of sex-segregated education and "diversity." *Id.* at 734, 739-40. Powell's dissent

With respect to the gender of its participants, *Hogan* played several reversals on the larger social scheme. A woman wrote the Court's opinion, and women's voices were heard on *both* sides during argument. That the case was brought by a man challenging his exclusion from a women-only institution is itself a reversal of more common problems in sex discrimination. Men's exclusion from women's sphere is rare, and where it exists, it rarely needs enforcement. Any preconceived notions about the centrality of men and the marginality of women were therefore thoroughly undermined at the level of courtroom exchange. Faced with both a man and woman who claimed to be "different" from their assigned gender roles, the Court struck down a sex classification based on stereotyped sex-role assignments. The articulation of non-traditional difference came from both genders, and the Court sought to accommodate those differences.

III. Conclusion

If nothing else, the cases presented above should demonstrate that the perspectives of women and men *are* radically different. The problem, of course, is what to make of such difference, and more importantly, who decides what to make of such difference. From the traditional male perspective, which insists on its own "objectivity," women's difference invites condescension and paternalism. By virtue of men's notions about "their difference," women have been excluded, silenced, demeaned, put on pedestals and placed in cages, objectified and acted upon, all in the name of "protection." When men, however, have failed to recognize women's differences, their definitions of equality and justice have been male-centered rather than generic. For example, traditional notions of equality in workplaces outside the home, which developed when many women were still restricted to the home, disregard women's particular needs with respect to pregnancy and childbearing. In law, as in language, the generic has been defined and appropriated by men.[293]

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also misconstrues the harm, ignoring the stereotypical harms inflicted on women, claiming that the majority "hardly can claim that women are discriminated against." *Id.* at 745 (Powell, J., dissenting). Thus, both dissents evidence blindness not only to the experience of women, but, once again, to the dangers of paternalism.

293. In Old English, "man" was generic, "wer" referred to males, "wif" to females. Similarly, in Latin, "homo" was generic, "vir" was male, and "mulier" or "femina" was female. In English, males have usurped the generic, so that most

The pursuit of women's equality requires a recognition of gender differences that does not assign positive and negative values to the terms "male" and "female." Such a recognition can only truly arrive when the perspectives of women and men have equal weight. It requires the full and active participation of women as well as men in the structuring of social institutions. Only in this manner can difference be recognized and accommodated. What this suggests is that the law, given its male history, its continuing domination by men, its paternal predilections, and its tendency to translate difference into opposition, is a particularly inappropriate vehicle for the pursuit of women's equality.

But such a conclusion is both too simple and too dangerous. Too dangerous, at least when reached by a man, because it threatens to perpetuate women's exclusion and disempowerment, as we all too comfortably throw up our hands in impotent dismay. Too simple, because it does not account for the gains that have been made through law. The case history detailed above suggests that there is a middle way between outright exclusion on the one hand and paternalistic inclusion on the other. Ginsburg sought to infuse the reigning male perspective with a female point of view. To that end, she challenged men's unquestioned assumptions about the nature of the "other" sex, as well as about themselves. An analysis of her efforts suggests that achieving those goals in practice is both more difficult and less impossible than theory might suggest.[294]

It was not enough, in *Frontiero*, to persuade the Court to take judicial notice of women's history of inequality. The limitations of that recognition became evident in *Kahn* and *Ballard*, where the Court sustained gender-based classifications on weakly supported paternalistic rationales. In retrospect, the *Kahn* and *Ballard* results are not surprising. In both cases, the Court confronted male plaintiffs who sought benefits for themselves, and a state that offered a rationale based on the very inequality that the Court had just recognized in *Frontiero*. In *Kahn* and *Ballard*, the state saw what the Court had seen—women's inequality—but neither state nor Court saw that its

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of our "neutral" terms are interchangeable with the male-gendered terms—e.g., man, chairman, doctor—but not with the female-gendered terms. *See* Sexist Language: A Modern Philosophical Analysis (Mary Vetterling-Braggin ed. 1981); Casey Miller and Kate Swift, Words and Women (1976); Robin Lakoff, Language and Women's Place (1975).

294. *See supra* note 35 and accompanying text.

cause and purported remedy were one and the same—paternalism.

Opening the Court's eyes to its own paternalism proved much more difficult. The very idea of "doing justice" requires a certain blindness to paternalism. The social security cases were Ginsburg's initial response. By bringing before the Court male plaintiffs tied by marriage to women, she could characterize any differentiation as imposing upon women a direct economic burden. Tangible harm to members of the allegedly protected group dramatically undermined protective rationales. By using married or widowed male plaintiffs, Ginsburg was able to invite, foresee, and counteract the state's "benign" rationales. The social security cases forced the Court to question its own paternalism and demanded that remedies be framed in functional, rather than gender-conscious, terms.

In *Boren*, the Court extended the doctrine of sex discrimination by calling for a heightened standard of scrutiny, neutrally applied, but ultimately resting on a recognition of women's substantive inequality. The vehicle for this development was a focus on stereotypic gender proxies. The test could and had to be applied neutrally in order to avoid paternalism, but its basis was a presumption that all sex-role stereotypes harm women more than men. The Court's recent opinion in *Hogan* further developed the focus on stereotypes. In that case, Justice O'Connor phrased and applied the *Boren* proxy test neutrally (to a man), but she repeatedly warned the Court to beware of its own paternalistic blinders.

As many of these cases illustrate, the use of male plaintiffs provides several advantages for women's rights groups in litigating sex discrimination claims. First, the justices of the Court may simply be more likely to perceive a harm to one of their own gender. Second, male plaintiffs are often the only ones, under present standing and ripeness doctrines, who can challenge certain aspects of "benign" discrimination. Third, the use of the male plaintiff is almost certain to elicit benign rationales for discrimination, no matter what his claim. To the extent that such "protective" attitudes lie at the root of sex discrimination and are a principal reason for its obfuscation, their uncovering, articulation, and eradication are necessary to the pursuit of equality. Lastly, the application of a gender discrimination inquiry to men forces women's groups, and the Court, to formulate a truly neutral standard, one which defines neutrality as *required* by women's substantive experience of in-

equality. *The neutrality sought is one that takes woman's difference into account without thereby subordinating her.* This goal may be furthered by the gender proxy inquiry articulated by Brennan in *Boren*, insofar as it provides incentives for legislatures and courts to replace gender lines with functional classifications. Whether functional classifications can be drawn without male bias remains open to question, but the filtering of women's interests through men's perspective requires such redefinition if women are to approach equality.

The male plaintiff is not without disadvantages. Where women and men are in fact different, in ways that cannot be redefined as "similarly situated" by a more neutral conception, a male plaintiff will be of no help. Historically, these are the cases that women lose.[295] As a practical matter, these cases may be the most important, and not only because they involve such significant women's issues as pregnancy and childbirth. Irreducible differences represent the cutting edge of the problem of sexism; such differences form the bedrock for the very conception of woman as "other."[296] Development of sex discrimination jurisprudence with male plaintiffs tends to avoid these harder issues. Sexism operates by distinctions; the question is whether gender distinctions can exist free of sexist values. In the law, which also operates by distinctions, it seems that women's irreducible differences cannot yet be fairly accommodated.

Kahn and *Ballard* demonstrate that even where men and women are similarly situated, a male plaintiff may raise problems of perspective. In *Ballard*, women were silent. In *Kahn*, a male plaintiff distorted a woman-centered perspective by filtering it through his male point of view. Women's amicus briefs can break the silence. But distortion is a much more intractable problem. Substitution of female plaintiffs offers no simple solution, for the distortion of the male perspective pervades our legal culture.

The history and theory of modern American and French feminism suggest that society can recognize gender differences without disparagement only when women participate fully in the act of recognition. The insinuation of women's perspective via "similarly situated" arguments *can* broaden the Court's perspective, but it may be that a true non-hierarchical recognition of difference requires, finally, a Court composed equally of

295. *See supra* notes 78-81 and accompanying text.
296. *See supra* note 26.

women and men. Unfortunately, the path to equal participation in making and administering the law is through the law, short of revolution.[297] The task, then, is to question and redefine our notions of equality and our definitions of "similarly situated," with a view toward increasing women's access to the public sphere. The catch, of course, is that such redefinitions require the active participation of women. Thus, access must have already been achieved before we can redefine rules in order to create access. As troubling as this circularity is—and the foregoing history demonstrates only some of the difficulties—the circle of male insularity has been broken. Women are speaking. It is imperative that we all listen. Such an effort requires a vigilant self-consciousness on the part of male judges, lawyers, writers, and readers—a self-consciousness which does not take our objectivity for granted, which listens to and invites difference, and which defers to those who have for so long deferred to us. Only when women and men participate equally in the law will the law be able to see, as women have come to see, that men are just as different from women as women are different from men.

297. Far be it from me to preclude the latter path. *See, e.g.*, Women and Revolution (Lydia Sargent ed. 1981).